Filed 11/2/16 P. v. Flores CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROY BOYD FLORES, JR.,

Defendant and Appellant.

F069504

(Fresno Super. Ct. No. F12901226)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles and Alvin M. Harrell III, Judges.*

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Judge Skiles presided over the trial; Judge Harrell presided over and ruled on the *Pitchess* hearing.

INTRODUCTION

Appellant/defendant Roy Boyd Flores, Jr. was convicted after a jury trial of two felony counts of obstructing or resisting an executive officer by means of threats or violence (Pen. Code, § 69)[1] and one felony count of unlawfully attempting to remove an officer's firearm from its holster while the officer was engaged in the performance of lawful duty (§ 148, subd. (d)). The convictions resulted from an incident where officers believed he was connected to three people they had detained in a parked car. One of the officers contacted defendant and saw his ankle monitor, and defendant said he was on parole. The officers testified he violently resisted an attempted parole search. Defendant testified he had nothing to do with the detained individuals, and he never resisted the officers. Defendant testified an officer threw him to the ground and punched and kicked him for no reason. He unsuccessfully relied on the defense that the officers used excessive force against him. Defendant was sentenced to three years and was ordered to serve the first half of the sentence in custody and the second half on mandatory supervised release.

On appeal, defendant contends the court erroneously allowed the prosecutor to impeach his trial testimony with the fact of his prior misdemeanor conviction for resisting arrest; the prosecutor committed prejudicial misconduct by eliciting inadmissible evidence in violation of the court's evidentiary rulings; and the court should have instructed on a lesser included offense. Defendant also requests this court to review confidential and sealed records regarding the denial of his motion for discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

We will conditionally reverse defendant's felony convictions in counts I and III for obstructing or resisting an executive officer by means of threats or violence, based on

[1] All further statutory references are to the Penal Code unless otherwise indicated.

the trial court's prejudicial failure to instruct the jury on lesser included misdemeanor offenses. We will also find the court improperly denied defendant's motion for *Pitchess* disclosure. We will address the other issues for guidance on remand.

FACTS

On February 19, 2012, Fresno Police Officers Christopher Keener and Caroline Ponce were on patrol together in the area of Sylmar and Hedges Avenue. The officers testified this was a high crime area where drug sales, gang shootings, and thefts had recently occurred.

At 7:30 p.m., the officers observed a vehicle parked in front of an apartment complex. There were three people inside the car, and they were acting nervous.

Rosalinda Cortez (Cortez) was the driver, Lina Campos (Campos) was sitting in the front passenger seat, and Perfecto Beltran (Beltran) was in the back seat. Officer Keener knew Beltran was on probation. Campos said the car was registered to her, and she was on active probation.

Officers Keener and Ponce testified that Campos said she was dropping off a friend named Mike, and they were waiting for him. Keener testified Campos pointed to a second floor apartment, and said Mike had gone in there. Ponce testified Cortez, the driver, was still acting fidgety and moving her hands around.

The three occupants complied with the officers' orders to get out of the car. They were searched for weapons and did not have any.

Defendant leaves the apartment

Officer Keener testified that as he was talking to Campos, he saw someone walk out of the second floor apartment that Campos had pointed out. Campos said that person was "Mike," and she thought he was on parole.

Officer Ponce testified she was talking to Cortez when Campos pointed to a person by the apartment and said, "[T]hat was Mike."

The man who walked out of the apartment was later identified as defendant Roy Boyd Flores, Jr. Neither officer recognized or knew defendant. There was no evidence that defendant knew the three occupants of the car, that he was also known as "Mike," or that "Mike" actually existed.

Officer Keener testified defendant looked at him, and then walked down the apartment staircase. Defendant was wearing baggy clothes and carrying a backpack. He was also wearing an ankle monitor, which was clearly visible over his pant leg.

Officer Keener testified that he would have stopped defendant regardless of his possible connection to Campos and Beltran, based on "the apartment that he was coming from and my knowledge of what takes place at that apartment."

Officer Keener contacts defendant

Officer Keener testified that he left Officer Ponce with the three people from the car. Keener walked towards defendant and called out, "[H]ey, Mike, can I talk to you?" Defendant said he was not Mike. Keener again asked if he could talk to him. Defendant walked toward Keener and they met in the middle of the street.

Officer Ponce saw Officer Keener talk to defendant. She assumed defendant was "Mike" from the car. Ponce turned her attention back to Cortez as Keener approached defendant, and did not watch their interaction.

Officer Keener testified he saw the ankle monitor and asked defendant for his name, but Keener could not remember what defendant said. He also asked defendant if he was on parole or probation. Defendant said he was on parole.

Officer Keener testified he intended to search defendant for weapons. He was concerned for his safety because defendant was on parole, he was wearing baggy clothes, and he might have a weapon.

Officer Keener testified he asked defendant to walk to the curb so they could get out of the street. Defendant complied. Keener asked defendant to turn around, put his hands on top of his head, and spread his legs. Defendant again complied. Keener

testified, "I put his hands on top of his head and put him into the position I wanted him in." Keener testified defendant still had the backpack over one shoulder, and he did not remove it. Keener was not concerned about the backpack because he was controlling defendant with his hand. Keener did not tell defendant that he was going to search him, but just started to conduct the search.

Officer Keener's testimony about the struggle

Officer Keener testified that as soon as he placed defendant in the search position, he felt defendant's arms tense up like he was "kind of pulling forward." Keener was holding one of defendant's hands, and he used his other hand to start searching defendant. Defendant moved forward and pulled his arms away. Keener lost his grip, defendant took one or two steps forward, and he "tried to run off."

Officer Keener testified he grabbed defendant under his left armpit and over his right shoulder to "contain him and just put him in handcuffs." He did not put his arm around defendant's neck. Keener and defendant faced each other, and he told defendant "to quit resisting arrest and to quit fighting me."

Officer Keener testified defendant did not verbally respond, but he was "still trying to overpower me and trying to assault me."

Officer Keener's testimony about his gun

Officer Keener testified they struggled and fell to the ground. Defendant fell on top of Keener so that Keener was on his back and right side, and defendant was on top of him.

They rolled on the ground and changed positions so that defendant's back was on the ground, and defendant was looking up. Officer Keener was on top of defendant, and his left side was on defendant's abdomen. Keener still had a grip on defendant, but Keener's right side was "exposed" in the air.

Officer Keener testified that while they were in this position, defendant tried to grab his service weapon, a Beretta 40-caliber semiautomatic handgun, which was

holstered on his right side. It was loaded with one round in the chamber, and the safety was on. Keener's weapon was secured in his holster with a simple locking mechanism, which could be opened by using a thumb to rotate the lock in one motion.

Officer Keener testified he saw and felt defendant grab the gun's grip, and he tried to pull it out of the holster.[2] Keener yelled to Officer Ponce for help and said that defendant was grabbing his gun.

As defendant tried to grab his gun, defendant told Officer Keener that "if I let him go, he's going to kill me and that he was not going back to prison." Keener testified he was afraid that defendant would kill one or both of the officers to get away, and he did "what I had to do to protect myself" and not get killed.[3]

Officer Keener testified defendant continued to fight with him and kept trying to unlock the gun holster. Defendant tried to punch Keener in the face but missed. Defendant used "a great amount of force" as he tried to grab his gun, so that he was "tugging" Keener's duty belt up and down. Keener looked down and could see defendant pulling on his gun.

Officer Keener testified he punched defendant in the face with his fist five or six times. He told defendant to stop pulling on his gun and stop resisting, "or I'm going to keep punching you in the face." Defendant's legs were kicking and flailing, and still tried to get the gun. There was "a lot of sprawling and position changes and punches being thrown and body strikes and stuff like that." Keener felt he was fighting for his life, and defendant was trying to kill him.

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[2] Officer Keener's testimony about defendant's attempts to remove his gun was the basis for felony count II, attempting to take his firearm from its holster (§ 148, subd. (d)). Defendant was convicted of this charge.

[3] Officer Keener's testimony about defendant's threats was the basis for count IV, criminal threats. The jury was unable to reach a verdict on this count and the court declared a mistrial.

Officer Keener's testimony about the Taser

Officer Keener testified that Officer Ponce arrived to help and tried to use her Taser on defendant. Keener was on top of defendant, and holding defendant down on his back. Ponce inadvertently hit Keener's right leg with the Taser. Keener jerked up because of the Taser hit. Defendant grabbed Keener's neck and pulled him back down to the ground, and kept trying to get his gun. Keener believed that Ponce again discharged her Taser, and hit herself and then defendant, but defendant continued to struggle.

As the struggle continued, Officer Keener delivered three or four knee strikes to defendant's head and upper torso. The knee strikes seemed to daze defendant, and he slowed down so that Officer Ponce finally placed him in handcuffs. Keener believed defendant's backpack fell off during the struggle. The entire struggle lasted less than one minute.

Officer Ponce's testimony about the incident

Officer Ponce testified that she was preoccupied with Cortez when Officer Keener initially contacted and spoke to defendant. Ponce searched Cortez, and a glass methamphetamine pipe fell to the ground.

Officer Ponce testified that as she talked to Cortez about the pipe, she suddenly heard a commotion and turned around. Defendant and Officer Keener were standing up. Keener grabbed defendant's arm and said to stop fighting. Defendant tried to pull away from Keener, and there was a struggle between them. She did not know why defendant was struggling with Keener. She did not hear Keener call for help, but she was determined to assist her partner. Ponce ordered Cortez to sit on the curb and stay next to the car. She rushed to Keener's location.

Officer Ponce testified that she did not see how it happened, but defendant and Officer Keener were on the ground, they were "kind of tangled up," and still struggling. Keener was on top of defendant and lying on his left side. Keener's arms were around

defendant's body, and his right side was exposed in the air. Keener kept telling defendant to stop fighting.

Officer Ponce testified that defendant's right hand was "grabbing" at the grip of Officer Keener's gun. Ponce testified defendant was moving his hand in such a way that he was "jiggling" the gun, and trying to break the holster lock so he could remove it.[4] Ponce heard Keener say that defendant was grabbing his gun. She also heard Keener tell defendant to stop grabbing his gun.

Officer Ponce testified she was afraid defendant was going to remove the gun from Officer Keener's belt. She tried to pry defendant's fingers off the gun, but he had a "very strong grip," was "fairly strong with the adrenalin going," and he did not let go. Ponce called for immediate backup assistance with her portable radio, and advised dispatch that the subject was grabbing her partner's gun. Ponce kept trying to gain control of defendant's arm.

Officer Ponce testified she told defendant that she was going to "tase him" if he did not stop struggling. She removed the cartridge that contained the darts for the Taser because they were in such "close quarters." Ponce used a "contact tase" on defendant's body to give him a "jolt" and gain control over him.

When she deployed the Taser, however, defendant was kicking and squirming so much that Officer Ponce hit her own leg three times, and she hit Officer Keener once. Ponce ultimately hit defendant's leg with the Taser, but it was not effective, and he did not comply with their orders.

Officer Ponce put the Taser aside and used both of her hands to grab defendant's arm. Officer Keener and defendant rolled around, and she placed one handcuff on his right wrist. Defendant's left arm was tucked underneath his body. Keener kept saying

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[4] Officer Ponce's testimony on this point was introduced as further evidence in support of count II, attempting to take Officer Keener's firearm from its holster; defendant was convicted of this charge.

defendant was reaching, and they thought defendant was trying to get something in his shirt or waistband. Ponce reached under defendant's body and finally grabbed his left arm, and placed him in handcuffs.

Officer Ponce testified that during the struggle, she saw Officer Keener hit defendant in the face with his fists. Ponce did not see Keener hit defendant's face with his knee. It was possible that Keener delivered the knee strikes while she was deploying the Taser or calling for backup. Ponce did not hit defendant with her fists or knee.

Officer Ponce testified defendant never stopped resisting, and the struggle ended only after he was restrained in handcuffs. Ponce felt the force they used against defendant was justified because defendant was "actively grabbing" at Ponce's firearm. Ponce would have felt justified to use deadly force but she was afraid she might have shot Officer Keener in such close quarters.

After the incident

After defendant was taken into custody, the officers determined he had an outstanding parole warrant for his arrest. He was not in possession of any weapons or contraband.

Officer Keener testified he needed medical treatment for a contusion on his hand, and bruises on his right hand and right knee from punching and striking defendant.

Officer Keener testified that during the struggle, he suspected defendant was under the influence because he did not react to being hit with the Taser or punched in the face. Defendant did not appear to show any pain. After defendant was taken into custody, Keener spoke to him, and it appeared he was under the influence of a stimulant-based drug. Defendant talked very, very fast, he had a rapid eyelid flutter, and rebound dilation of his pupils in response to light.

As we will discuss below, Sergeant Boyer responded to the scene and conducted a brief tape-recorded interview with defendant while he was sitting in a police car.[5]

Defendant had minor scratches and swelling on his forehead. He was taken to the hospital because of the Taser strike, but he refused medical treatment.

As we will also discuss below, a blood sample was taken from defendant after he was arrested.[6]

Rosalinda Cortez's trial testimony

Rosalinda Cortez was called as a prosecution witness. Cortez testified she was with Lina Campos that night, and she drove Campos's car to Perfecto Beltran's house. Cortez had used methamphetamine that day. They were going to drive Beltran to the hospital because he had a lesion on his arm. Cortez testified that Beltran's friend, "Mike Torres," was at Beltran's house. Mike wanted to go with them to the hospital, but he needed to pick up a charger for his phone. Cortez testified Mike was a "real person."[7]

Cortez testified that Mike said he needed to borrow a phone charger from a girl. Cortez followed Mike's directions and drove to an unfamiliar area where there were two large apartment complexes. Mike got out of the car; Cortez did not see where he went. Cortez parked the car, and they waited for Mike to return.

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[5] As we will discuss in issue V, *post*, the court held the prosecution could not introduce defendant's postarrest statement to Sergeant Boyer in its case-in-chief because defendant was in custody and was not advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). However, the court held defendant's postarrest statements were not involuntary, and could be used to impeach his trial testimony. The court also held that Boyer could be called as a rebuttal witness about inconsistencies between defendant's postarrest statement and his trial testimony on two limited issues.

[6] The prosecution did not introduce direct evidence of the blood test. As we will discuss in issue IV, *post*, the prosecutor used the toxicology report to cross-examine defendant about his level of intoxication. Defendant argues the prosecutor committed prejudicial misconduct by using her own questions to introduce inadmissible evidence.

[7] Despite this testimony, there was no evidence introduced at trial to confirm the existence of "Mike Torres," or that defendant knew Beltran, Cortez, and/or Campos.

Cortez testified the police arrived as they were waiting for Mike. Officer Keener[8] asked what they were doing, and if they knew they were in a drug area. Cortez said no, and explained they were taking Beltran to the hospital, and waiting for Mike to get a phone charger from a friend. Cortez testified she told the officer that Mike went "to the apartments."

Cortez testified she never told the police they were there because someone was getting drugs. Cortez never pointed to a particular apartment or told the officers that Mike went inside. Cortez denied saying that Mike went into an apartment to buy drugs.

Cortez testified the officers told them to get out of the car and they complied. Officer Ponce asked Cortez if she had anything on her. Cortez lied and said no. She started fidgeting because she had a glass pipe that contained methamphetamine. She was trying to hide the pipe, but it fell down and broke when Ponce frisked her. Cortez told Ponce that she smoked methamphetamine about two hours earlier, and some methamphetamine was still in the pipe.

As Officer Ponce talked to her, Cortez saw defendant walk down the stairs of the apartment building. Cortez testified she did not know defendant, and he was not Mike.

Cortez heard Officer Keener ask Campos or Beltran if defendant was Mike. Cortez testified they said, "[N]o, that's not Mike." Cortez testified the officers did not ask her if defendant was Mike.

Cortez testified Officer Keener spoke to defendant as if he was "Mike" and told him to approach. Keener and defendant met in the middle of the street.

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[8] Cortez did not know the names of the two officers, and referred to them as the male officer and the female officer. Since there is no dispute about the identities of the officers in this case, we will refer to them by their names for ease of reference in addressing Cortez's trial testimony.

Cortez testified she did not hear the conversation between defendant and Officer Keener, or see the initial interaction between them, because she was talking to Officer Ponce about the broken methamphetamine pipe.

As Officer Ponce continued to talk to Cortez, however, Cortez heard Officer Keener call out to Ponce for help. Both Ponce and Cortez turned and looked at defendant and Keener, who were about four feet away. Cortez testified Keener was struggling with defendant. Ponce ordered Cortez to sit on the grass and wait, and Ponce went to help Keener "subdue" defendant. Cortez did not hear Keener say anything about his gun at that time.

Cortez testified Officer Keener had one of defendant's arms, but it looked like defendant was struggling with Keener. Keener "was trying to tell [defendant] to put his hand behind his back and he wouldn't." She did not see Keener's arm around defendant's neck.

> "Q Okay. And you said that the defendant was resisting?
>
> "A Yes.
>
> "Q What is it that you saw that made you believe that?
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> "A Because he was – like I said, [Officer Keener] was trying to say put his hand behind his back and then [defendant], he was saying well, no, no, no, like he didn't do anything…."

Cortez heard Officer Keener give defendant several commands to stop resisting. She did not hear Keener say anything about his gun at that time. Defendant kept struggling and did not listen to the officer's commands.

Defendant was face down on the ground and struggling "like a fish out of water." Officer Keener's knee was on defendant's back. Cortez heard Keener tell defendant to stop reaching for his gun. Cortez testified she never saw defendant reach for the gun, because Keener and Officer Ponce were each holding one of defendant's arms, and it would have been impossible for defendant to reach Keener's gun.

> "What I saw is that [defendant] did not reach for the gun because they – the [two officers], they each had an arm. They each had an arm on the gentleman …, they each had an arm and they couldn't subdue him. So what I saw, he was not reaching for his gun."

Cortez heard the Taser go off and hit defendant, but she did not see which officer fired it. The two officers were on top of him. After he was hit with the Taser, defendant was "struggling on the floor with his face down, but they were still unable to lock his arms … but it wasn't fighting."

Cortez did not see the officers kick or hit defendant. She did not see Officer Keener put his arm around defendant's neck. Defendant kept saying he did not do anything and yelled, "[A]nyone filming this?"

Cortez testified that after defendant was taken into custody, Officer Keener asked her if he did the right thing because defendant was reaching for his gun. Cortez testified she replied, "[W]ell, if he was reaching for your gun then yeah, you guys did what you guys had to do." "I also told the officer that I had not seen – that I didn't see, you know, so – but he says okay. But you didn't see – but you heard me say stop reaching for my gun…. Well, if you're reaching for your gun then yes, the message that you guys used to subdue him was the right one. That's what I told him." Cortez never said that she strongly believed defendant was handled appropriately and treated with respect.

Cortez testified she was not honest when she spoke to the police after the incident. "I felt like I had to tell them what they wanted to hear because they were letting me go." Officer Ponce had already told Cortez that she could leave, she was not going to be arrested for having the pipe, and they were not going to impound the car. Cortez knew that Beltran and Campos were being arrested. Cortez was afraid she would be arrested if she did not cooperate.

Cortez testified she did not feel the officers did the right thing that night because they would not believe why they were there, that defendant was not Mike, and Cortez did not know "how it got to the point that it did."

Cortez's prior statements

Douglas Bolton (Bolton), an investigator for the district attorney's office, testified he interviewed Cortez prior to trial about her interaction with the police. Cortez told Bolton that she dropped off Mike at the apartment complex because he was going to pick up a phone charger. Cortez said she did not see which apartment Mike went into.

Cortez told Bolton that she was trying to hide her glass pipe when defendant walked out of "the apartments" that Mike had gone into. Cortez did not know defendant, but she knew he was not Mike. Cortez said Officer Keener asked her if defendant was Mike, and Cortez said no.

Cortez said Officer Keener told defendant to put his hands behind his back; defendant asked why. Keener held one of defendant's arms and told defendant to stop resisting and put his hands behind his back. Defendant struggled and did not listen to the officer's commands. Cortez said Keener again told defendant to stop resisting. At some point, Officer Ponce went to help Keener and held defendant's other arm. Cortez said she heard Keener say, "[S]top reaching for my gun." Cortez said she did not see defendant reach for the gun because the two officers were each holding one of defendant's arms. Cortez said that defendant was eventually hit by a Taser, but he continued to struggle.

Cortez told Bolton that when an officer asked her what she thought about the incident, she replied that defendant tried to reach for the gun. Cortez told Bolton that she believed defendant was not reaching for the gun, and explained that she told the police what they wanted to hear because she did not want to get arrested for the glass pipe.

DEFENDANT'S TRIAL TESTIMONY

Defendant testified he had one prior felony conviction and three prior misdemeanor convictions, from 2005 to 2009. The convictions were for delaying or obstructing a police officer, a domestic violence case, and a gun charge. At the time of this incident, he was on parole for the weapons charge and ordered to wear an ankle monitor because he had missed some appointments with his parole agent.[9]

Defendant testified he used methamphetamine around 3:00 a.m. on February 19, 2012. He regularly used methamphetamine at that time. Defendant knew that he violated parole by using methamphetamine that day. When he took methamphetamine, he usually stayed up all night and became real tired and sleepy if he did not take any more during the day. Defendant no longer used methamphetamine at the time of trial.

Officer Keener calls out to defendant

Defendant testified that on the evening of February 19, 2012, he was at the apartment complex because he managed the unit, and he was trying to pick up the rent. He never told the officers that reason because they never asked him.

He was wearing his ankle monitor over the top of his left pant leg, and it was not concealed. He was starting to become tired from his earlier use of methamphetamine at 3:00 a.m.

Around 7:30 p.m., defendant left a second story apartment. As he walked out of the door, Officer Keener shouted, "Hey, Mike, come here." Defendant saw Keener

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[9] As we will explain in issue III, *post*, the court granted the prosecution's motion, over defendant's objections, to impeach his trial testimony with certain prior convictions, including his misdemeanor conviction for resisting arrest. As a result of that ruling, the record implies that defense counsel decided to ask defendant about his record on direct examination before the prosecutor did. On appeal, defendant argues the court erroneously permitted impeachment with a conviction for misdemeanor resisting because it was similar to the charged offense. The People point to defendant's direct examination testimony herein and argue defendant failed to object to this evidence.

across the street. Defendant walked down the staircase, looked at Keener, and said, "I'm not Mike." Keener said, "Michael, can I talk to you for a second."

Defendant reached the ground floor and Officer Keener again said, "[H]ey, Mike, come here." Defendant said, "I'm not Mike." Keener told defendant, "[C]ome here anyways."

Defendant crossed the street toward Officer Keener. When he reached the middle of the street, Keener asked if he was on probation on parole. Defendant pointed to his ankle monitor and said yes. Keener asked which one. Defendant said he was on parole.

Defendant testified Officer Keener grabbed his right arm and said, "[L]et's go across the street." Keener held onto defendant's right arm and walked on his right side until they reached the opposite curb. Keener told defendant to turn and face the street. Keener removed defendant's backpack and put it on the ground.[10] He told defendant to put his hands behind his back. Defendant testified he complied with Keener's instructions, and never tried to get away from him.

Defendant testified Officer Keener did not say anything else to him, or tell him to do anything. Keener was behind defendant, held defendant's thumbs, and then held defendant's hands. Keener started to raise defendant's arms above his head. As Keener raised his arms, defendant was forced to bend forward to the ground, and his arms went straight in the air. Defendant's chest felt tight, but he did not move his feet.

Defendant testified he felt his arms shake back and forth, and "and as soon as I start coming down I lost sight." Officer Ponce was standing to defendant's left, and he saw her eyes light up and get big. Defendant testified he could not figure out what happened, but Officer Keener put him in a headlock and threw him to the ground. Defendant's hands were still behind his back, and Keener's left arm was around his body.

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[10] Officer Keener testified he did not remove the backpack, and it stayed on defendant's shoulder as he began the search.

Defendant felt he was in the air and then his head hit the ground. Keener punched the side of defendant's head with his fist.

Defendant was lying on his stomach. Officer Keener's left arm was around defendant's neck, he was on top of defendant's right side, and he kept punching him. Defendant's hands were still behind his back and pinned between his back and Keener's body.

Defendant testified he felt his legs get pulled up a little bit. Officer Keener looked back and said, "[H]e's reaching for my gun." Defendant thought he was talking to Officer Ponce. Defendant pulled his hands from behind his back and moved them under his body because "I didn't want my hand anywhere around what he said was happening" with his gun.[11]

Defendant testified that Officer Keener told Officer Ponce to "tase him." Defendant felt the Taser jolt on the right side of his back.

Defendant testified that throughout the incident, he was "taking it" because he knew that if he resisted the police "you don't end up too good." Defendant tried to "take" the Taser jolt, but it was like "putting your hand on a hot stove," and he "kicked out" in reaction to it. Defendant testified Officer Ponce used the Taser a second time, it hit his right leg, and he kicked again. Defendant heard another "zap." Officer Keener screamed and released defendant's neck.

Defendant testified Officer Ponce grabbed his right arm, placed it in a handcuff, and then pulled out his left arm. Defendant testified Officer Keener "kneed" him in the back of his head "a lot." Keener finally stopped "kneeing" him, and Ponce restrained defendant's left hand in the handcuff.

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[11] On direct examination, defendant did not address whether he touched Officer Keener's gun. As we will explain post, he offered a different story on cross-examination.

Defendant testified that after Officer Ponce placed him in handcuffs, she went back to the other people who had been detained. Defendant was still on the ground. Officer Keener got on top of defendant, grabbed his shoulders, pushed him up and down, and bounced his chest on the curb. Defendant testified that Keener said, "I will kill you."

Defendant testified he never tried to hurt the officers. He never threatened to kill Officers Keener or Ponce during any part of the incident. He never told Keener that he would kill him if he had to go back to prison. Defendant testified the only thing he said during the incident was to ask for help and whether "anybody was videotaping any of this."

Defendant testified additional officers arrived at the scene. About two or three minutes after the incident was over, an officer interviewed defendant and asked, "[D]o you know what we're doing out here tonight[?]" Defendant testified he had "an adrenalin rush" because he had been "kneed in the head." He was talking erratically and could not figure out what had happened to him.[12]

Cross-examination about the toxicology report

On cross-examination, the prosecutor asked defendant about his drug use. Defendant again testified he used methamphetamine at 3:00 a.m. The prosecutor produced a report that contained defendant's toxicology results and asked defendant to review it.[13]

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[12] As we will explain, defendant was briefly interviewed at the scene by Sergeant Boyer.

[13] Defendant's blood was tested at some point after he was arrested. The prosecutor did not introduce direct evidence about the blood test or the results, and the court was not called upon to address the issue. Instead, the prosecutor cross-examined defendant about his methamphetamine levels, and his admission that he had seen the results of his blood test. In issue IV, *post*, we will fully review the prosecutor's cross-examination questions, and address defendant's argument that the prosecutor committed prejudicial misconduct during that sequence by improperly using her questions to effectively "testify" about the contents of the toxicology report.

Defendant testified he had seen the document, and he knew it indicated what his toxicology levels were. Defendant testified he did not know what his exact levels were at the time of the incident.

> "Q. *Okay. Would it surprise you if I told you that your levels were .40 milligrams of methamphetamine*?
>
> "A *No*.
>
> "Q *Okay. Would it surprise you to know that that's in the potentially toxic range*?
>
> "A *I wouldn't know that*." (Italics added.)

The prosecutor asked defendant if he was nervous when he first saw Officer Keener because he had used methamphetamine at 3:00 a.m., he was under the influence, and he was on parole. Defendant testified he was not concerned but knew he could have his parole violated.

Further cross-examination about whether defendant grabbed Officer Keener's gun

In his direct examination testimony, defendant did not say anything about grabbing Officer Keener's gun. On cross-examination, the prosecutor asked defendant if anyone was holding his hands after he was on the ground. Defendant said Keener was on the right side of his body and had him in a headlock. Defendant's hands were still behind his back, no one was holding his hands, and his right arm was pinned between their bodies. His left arm was lying on the ground. Keener was punching him in the face.

Defendant conceded his hands were free to move and he felt something. The prosecutor asked defendant what he felt. Defendant testified that Officer Keener turned to Officer Ponce and said, "[H]e's grabbing for my gun."

> "[A]nd I felt – I don't know what it was. *It felt something like diamond grip on my middle finger on my right hand and I pulled my arms up underneath my chest.*" (Italics added.)

The prosecutor asked defendant if he touched Officer Keener's gun. Defendant "presumed that my hand was in the area and I felt something with my middle finger, one instant, and I pulled my hands under my chest." Defendant testified he did not pull anything, but he felt something on his finger that felt like a "diamond grip."

> "Q What's diamond grip?
>
> "A I don't know how to explain it. It's – *I guess it's a grip of a gun*, I guess. Some of them have, looks like stars on it, and it's – they're in diamond shape cluster." (Italics added.)

Defendant testified that when he felt the diamond grip, he got scared and moved his hands under his chest. As soon as he moved his hands, Officer Keener told Officer Ponce to "tase him." Defendant testified he did not intend to resist, but he felt the Taser and his leg kicked because of the pain. There was a pause and then another Taser hit, and he kicked again. He never heard the officers give him any commands, or tell him to stop resisting or stop grabbing the gun.

Cross-examination about defendant's postarrest statements

The prosecutor asked defendant about the statements he made to Sergeant Boyer after he was taken into custody.

Defendant testified that when Sergeant Boyer talked to him, he had just been "kneed in the head," and he "had an adrenalin rush from that, so I was kind of erratically speaking."

Defendant testified Sergeant Boyer recorded the interview, but defendant had not listened to the recording or reviewed the transcript. Defendant remembered some of what Boyer said, and that Boyer asked what happened that night. Defendant had the opportunity to tell his side of the story, but he did not tell Boyer what happened. Defendant testified that Boyer interrupted him.

Defendant testified that Sergeant Boyer asked why they had come out there that night. Defendant told Boyer that he was trying to figure that out himself. Defendant told

Boyer that he had called the police department the previous week to make an appointment with the chief of police. Defendant's father had been a police officer, and defendant wanted to talk about expunging his record.

The prosecutor asked defendant why he talked to Sergeant Boyer about calling the police chief, when Boyer just asked what happened that night. Defendant testified:

> "He asked me – I believe he asked me at that point why would you think we're out here tonight. And I couldn't tell you the truth. I was thinking what I thought other people were thinking to tell you the truth. I don't know. *I was high* and I was thinking why do I want to make an appointment with the chief of police if I've been doing that. They know that about me. I'm on parole. I don't know if I was a target or what. I couldn't figure it out. I don't know what was happening." (Italics added.)

The prosecutor asked defendant if he was confused, and defendant said yes.

> "Q Okay. And is it fair to say that is probably as a result of the drug use?
>
> "A I would say in the most part, yes."

Defendant did not remember Sergeant Boyer asking whether he had used drugs that night, or whether defendant said he had used methamphetamine. Defendant conceded that using methamphetamine was a parole violation.

Defendant testified he never told Sergeant Boyer what happened that night because he wanted to talk to an attorney first, but he did not ask Boyer for an attorney.

Redirect examination

Defense counsel asked defendant about the papers the prosecutor showed him regarding drug toxicity. Defendant testified he had no idea what those numbers meant. Defendant again testified that he used methamphetamine at 3:00 a.m. that day.

SERGEANT BOYER'S REBUTTAL TESTIMONY

The prosecution called Sergeant Boyer as a rebuttal witness.[14] Boyer testified he responded to the scene after defendant was taken into custody to obtain a statement from him related to the officers' use of force. He spoke to defendant when he was seated in the back of a patrol car and recorded the interview.

Sergeant Boyer testified he responded to the scene to interview the person that the officers used force on and obtain a statement, if possible, to complete an administrative document for that use of force. Boyer had not been involved in the incident and did not know defendant.

Sergeant Boyer testified he asked defendant to tell him what happened. Defendant "attempted" to give a statement. Defendant did not give specific facts about what happened based on his recollection.

Sergeant Boyer testified he did not interrupt defendant, but that defendant "continued to interrupt me" during the interview.

Sergeant Boyer testified he asked defendant if he had used drugs. Defendant "did not say that he had been using drugs, and again, his statement to that effect was rambling." Boyer asked defendant if he had used methamphetamine because he was showing signs of it. Boyer testified that defendant replied: "No, I'm hurting right now."

PROCEDURAL HISTORY

The amended information

In an amended information, defendant was charged with counts I and III, felony felony counts of obstructing or resisting an executive officer by means of threats or violence on, respectively, Officers Keener and Ponce (§ 69); count II, unlawfully attempting to remove Officer Keener's firearm from its holster while he was engaged in

[14] As we will discuss in issue V, *post*, defendant claims the prosecutor committed misconduct by asking questions beyond the scope of the court's ruling on the admissibility of Sergeant Boyer's testimony.

the performance of lawful duty (§ 148, subd. (d)); count IV, criminal threats against Keener (§ 422); and count V, being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), with one prior prison term enhancement (§ 667.5, subd. (b)).

Defendant separately pleaded guilty to count V, being under the influence of a controlled substance, and admitted the prior prison term enhancement. The other counts on the resisting incident proceeded to a jury trial.

Closing arguments

In his closing argument, the prosecutor argued defendant was guilty of the charged offenses based on the testimony from Officers Keener and Ponce, that he forcefully and violently resisted the officers as they were lawfully performing their duties, he tried to grab Keener's service weapon, and he threatened to kill Keener.

Defense counsel argued the officers were mistaken about defendant's identity, he was not guilty of resisting arrest because the officers used unreasonable and excessive force against him. Counsel asked the jury to review the definitions of unreasonable and excessive force in CALCRIM No. 2670, and argued defendant was not guilty because he never resisted the officers, he followed Officer Keener's instructions, but Keener threw him to the ground and punched him for no reason. Counsel further argued defendant was still not guilty even if the jury found he resisted Keener or defended himself, because Keener used unreasonable and excessive force against him.

Instructions

As relevant to defendant's excessive force defense and the issues which we will address below, the jury received CALCRIM NO. 2652 on the elements of counts I and III, violating section 69.

> "The defendant is charged in Counts 1 and 3 with resisting a police officer in the performance of that officer's duty in violation of Penal Code section 69. To prove the defendant is guilty of this crime the People must prove that, one, *the defendant unlawfully used force or violence to resist a*

police officer; two, when the defendant acted the officer was performing his or her lawful duty; and three, when the defendant acted he knew the police officer was performing his or her lawful duty.

"A sworn member of police department is a peace officer.

"A police officer is not lawfully performing his or her duty if he or she is unlawfully detaining someone or *using unreasonable or excessive force* in his or her duties.

"[I]nstruction 2670 explains when a detention is unlawful or force is unreasonable or excessive." (Italics added.)

The jury also received CALCRIM No. 2670, as to when a detention is unlawful or when force is unreasonable or excessive.

"The People have the burden of proving beyond a reasonable doubt that the officers were lawfully performing their duties as a peace officers. If the People have not met this burden, you must find the defendant not guilty of resisting a police officer.

"*A peace officer is not lawfully performing his or her duties if he or she is unlawfully detaining someone or using unreasonable or excessive force in his or her duties*.

"A peace officer may legally detain someone if the officer has knowledge the individual is currently on parole and required to submit their person and/or property to search and seizure as long as the detention is not done solely to harass or annoy the individual. In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known to the officer when he or she detained the person.

"Special rules control the use of force. A peace officer may use reasonable force to detain someone to prevent escape or to overcome resistance or in self-defense. If a person knows or reasonably should know that a peace officer is detaining him, the person must not use force or any weapon to resist an officer's use of reasonable force. *If a peace officer uses … unreasonable or excessive force while detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself or herself.* A person being detained uses reasonable force when he or she, one, uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and two, uses no more force than a

> reasonable person in the same circumstance or same situation would believe is necessary for his or her protection." (Italics added.)

Jury questions

The jury began deliberations at 11:21 a.m. on January 31, 2014. At 2:31 p.m., the jury sent a question to the court: "What is the definition of force vs. resistance as it's used under [CALCRIM No.] 2652 #1?"

The court held an unreported conference calls with the parties, and they agreed to the following written response: "The words 'force' and 'resist' do not have separate legal definitions and should be given their common, everyday usage."

At 3:25 p.m., the jury had another question: "What is Webster's definition of 'force'?"

The court held another unreported conference call with the parties, and they agreed to the following written response, which was given to the jury at 3:47 p.m.:

> "Please refer to instruction 200 regarding the 'ordinary everyday' meaning to be given to terms not otherwise specifically defined. The court may not go outside the evidence received during the trial and provide definitions of words not defined in the instructions. The term 'force' is to be given its 'ordinary everyday meaning.' "

At 4:48 p.m., the jury returned with its verdict.

Convictions and sentence

Defendant was convicted of counts I and III, felony resisting Officers Keener and Ponce, and count II, attempting to take Keener's firearm.

The jury was unable to reach a verdict on count IV, criminal threats against Officer Keener, and that charge was dismissed without prejudice.

The court denied probation and sentenced defendant to the midterm of two years for count I, plus one year for the prior prison term enhancement. The court imposed

concurrent terms for the other counts. The court imposed a split sentence and ordered the first half served in custody and the second half on mandatory supervised release.[15]

DISCUSSION

I. Denial of Defendant's *Pitchess* Motion

Defendant filed a pretrial motion pursuant to *Pitchess* for discovery of the confidential personnel records of Officers Keener and Ponce for prior complaints of excessive force and other allegations, in order to support his excessive force defense to the charged violations of section 69. The trial court found good cause to conduct an in camera review of the officers' records for excessive force. After conducting the in camera hearing, the court advised defendant that there was nothing to disclose.

Defendant requests this court to review the appropriate confidential and sealed records to determine whether the trial court should have granted discovery pursuant to his *Pitchess* motion. The superior court properly preserved the confidential record and transmitted it under seal to this court.

As we will explain, the court should have granted defendant's *Pitchess* motion for disclosure of information about five excessive force complaints that were previously filed against Officer Keener.

A. Pitchess Motions

We begin with the well-settled standards for the *Pitchess* discovery procedure. "Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess* ... allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a

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[15] At the sentencing hearing, the court told defendant that he should feel fortunate about what happened because "if I was the officer on the ground with you, and I had a way to reach my gun, I would have shot you until you stopped moving. And that didn't happen in this case. And [Officer Ponce] … didn't do that, and that's a level of restraint that I'm glad it worked out the way it did, but it could have very easily gone a different direction."

motion supported by declarations showing good cause for discovery and materiality to the pending case. [Citation.] This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery and the supporting declaration may include allegations based on 'information and belief.' [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

"The relatively relaxed standards for a showing of good cause under [Evidence Code] section 1043, subdivision (b) – 'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought – insure the production for inspection of all potentially relevant documents." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84; *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 856.)

"Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. [Citation.]" (*People v. Samuels*, *supra*, 36 Cal.4th at p. 109.) The court may order disclosure of "only that information falling within the statutorily defined standards of relevance. [Citations.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*).)

"Section 1045 requires the court, in determining relevance, to examine the information and exclude from disclosure: (1) complaints regarding conduct more than five years old, (2) the 'conclusions of any officer investigating a complaint ...,' and (3) facts that are 'so remote as to make disclosure of little or no practical benefit.' [Citation.] The defendant is entitled only to information the court concludes is relevant to the case, following the in camera review. [Citations.]" (*People v. Johnson* (2004) 118 Cal.App.4th 292, 300; *Warrick*, *supra*, 35 Cal.4th at p. 1019.)

The defendant is entitled to discover relevant information under *Pitchess* even in the absence of any judicial determination that the potential defense is credible or persuasive. (*Warrick*, *supra*, 35 Cal.4th at p. 1026; *People v. Gaines* (2009) 46 Cal.4th

172, 182.) "[O]nly documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery. [Citations.] This is because 'evidence of habit or custom [is] admissible to show that a person acted in conformity with that habit or custom on a given occasion.' [Citation.]" (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021, italics in original.)

For example, in *Herrera v. Superior Court* (1985) 172 Cal.App.3d 1159, the defendant was charged with drunk driving, battery, and resisting an officer. He filed a *Pitchess* motion for disclosure of prior complaints against the arresting officers for excessive force. *Herrera* explained that the defendant was entitled "to disclosure of only that information which the court, after conducting its *in camera* review, determines is *relevant* to the case. In this case, the only relevant information was that which related to the three officers' alleged propensity to use *excessive force*," subject to the limitations of Evidence Code section 1045. (*Id*. at p. 1163, first italics in original, remaining italics added.)

In *People v. Hughes* (2002) 27 Cal.4th 287 (*Hughes*), the trial court found the defendant showed good cause in his *Pitchess* motion to review personnel records for complaints related to the officer's credibility. *Hughes* held the trial court properly denied disclosure because the majority of the officer's file was irrelevant to credibility. During the in camera review, the trial court found only one complaint of excessive force had been "filed by a person more than three months after that person had been arrested for driving under the influence, but the court found that complaint to be remote and of questionable relevance to the specific issue of [the officer's] credibility …." (*Hughes*, *supra*, 27 Cal.4th at p. 330.)

The trial court has broad discretion in ruling on both the good cause and disclosure components of a *Pitchess* motion. On appeal, this court is required to independently review the sealed and confidential records, and determine whether the superior court

abused its discretion in refusing to order disclosure. (*Hughes*, *supra*, 27 Cal.4th at p. 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1229 (*Mooc*).)

In this case, consistent with customary procedure, the records have been made part of the record on appeal but have been sealed, appellate counsel for defendant have not been permitted to view them, and we have independently examined the material in camera. (See, e.g., *Hughes*, *supra*, 27 Cal.4th at p. 330.)

B. Defendant's Pitchess Motion

Defendant's pretrial motion for *Pitchess* disclosure sought the personnel records of Officers Keener and Ponce for complaints of excessive force. Defense counsel's sworn declaration stated that the officers used excessive force against defendant without provocation, provided false descriptions and altered their reports about the incident, and manufactured statements from the witnesses to conceal misconduct in this case. Counsel declared the requested documents were relevant and necessary for defendant's defense to the charged offenses, to impeach the prosecution's witnesses, establish a pattern of excessive force and misleading and false police reports, and corroborate defense testimony about the incident.

The city attorney's office, on behalf of the Fresno Police Department, conceded defendant set forth a sufficient factual scenario for the court to conduct an in camera review of the officers' records for complaints of excessive force, subject to the limitations of the *Pitchess* statutory scheme.

C. The Court's Finding of Good Cause

On April 19, 2013, the court convened a hearing on defendant's *Pitchess* motion. The court advised the parties that it found good cause to conduct an in camera hearing of the personnel records for Officers Keener and Ponce for complaints about excessive force. The court said if it determined discovery was appropriate, it would only disclose the names of citizens who had filed complaints within the five-year period.

Thereafter, the court conducted an in camera hearing and reviewed the personnel records for Officers Keener and Ponce. The custodian of records was the only person present. The court preserved the confidential documents in a sealed file, and those confidential documents were transferred to this court under seal for review pursuant to the *Pitchess* motion. The reporter's transcript of the confidential in camera hearing was also transmitted to this court under seal.

D. The Court's Advisement of its Ruling

Immediately after conducting the in camera hearing, the court resumed the proceedings in open court and advised the parties that it reviewed the officers' personnel records.

> "[U]pon review of the provided personnel records, the court concludes there is no information to be discovered by defense in this case.
>
> "With respect to [defense counsel's] request for information concerning not only incidents of unreasonable force but misconduct, including fabrication or any dishonesty, the court has come to the conclusion there is nothing in the files pertaining to those allegations as well."

E. Analysis

The trial court properly found defendant's *Pitchess* motion showed good cause for disclosure of complaints of excessive force filed against the two officers based on the nature and circumstances of this case. As we will explain in part II, *post*, the officers' alleged use of excessive force is a valid defense to a charge of felony obstructing or resisting arrest in violation of section 69. (*In re Manuel G.* (1997) 16 Cal.4th 805, 815–816; *People v. White* (1980) 101 Cal.App.3d 161, 164; *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 7.)

We find the court properly denied disclosure of any information regarding Officer Ponce.

As to Officer Keener, however, the trial court reviewed five complaints of excessive force which had been filed against him, for which he was later exonerated. It did not order disclosure of any information.

Our de novo review reveals that the trial court conducted the in camera hearing in 2013; the excessive force complaints were filed against Officer Keener in 2010, 2011, and 2012. These complaints were within the statutory five-year period and thus subject to disclosure pursuant to Evidence Code section 1045, subdivision (b)(1). (*Mooc*, *supra*, 26 Cal.4th at p. 1226.)

The determination of whether prior complaints are relevant and subject to disclosure is dependent upon the defendant's showing of good cause and materiality. In this case, defense counsel's declaration asserted the arresting officers used excessive force in their detention of defendant, and sought disclosure of any complaints based on excessive force in support of his defense theory. The five complaints filed against Officer Keener for excessive force were clearly relevant and material to defendant's *Pitchess* motion.

We thus turn to whether complaints which are otherwise relevant, but were deemed unfounded or the officers were exonerated, are subject to disclosure under *Pitchess*. The answer is supplied by the statutory *Pitchess* procedures, set forth in sections 832.5, 832.7, and 832.8, and Evidence Code sections 1043 through 1047. (*Mooc*, *supra*, 26 Cal.4th at p. 1226.)

Section 832.5 requires law enforcement agencies to investigate complaints filed against their personnel.

> "Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be *frivolous …, or unfounded or exonerated*, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, *shall not be maintained in that officer's general personnel file*. However, these complaints *shall be retained in other, separate files* that shall be deemed personnel records for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section

> 6250) of Division 7 of Title 1 of the Government Code) and *Section 1043 of the Evidence Code*." (§ 832.5, subd. (c), italics added.)

Evidence Code section 1043 is part of the statutory procedure for *Pitchess* disclosure. (*Mooc, supra*, 26 Cal.4th at p. 1226.) " 'Unfounded' means the investigation clearly established that the allegation is not true." (§ 832.5, subd. (d)(2).) " 'Exonerated' means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy." (§ 832.5, subd. (d)(3).)

Section 832.7 states that peace officer "personnel records" maintained pursuant to section 832.5 are generally confidential and shall not be disclosed in any civil or criminal proceeding "*except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code*" for *Pitchess* disclosure. (§ 832.7, subd. (a), italics added; *People v. Superior Court* (*Johnson*), *supra*, 61 Cal.4th at p. 855.)

The California Supreme Court has held as to *Pitchess* motions, that "[u]nsustained complaints are discoverable as well as sustained complaints. [Citations.]" (*People v. Zamora* (1980) 28 Cal.3d 88, 93, fn. 1 (*Zamora*).) *Zamora* relied on two earlier cases to reach this conclusion. In *Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231 (superseded by statute on another ground in *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1319–1320), the court held that it was error to deny *Pitchess* disclosure based on the mere fact that an internal investigation deemed the complaint unfounded or exonerated the officer.

Zamora also relied on *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, which similarly concluded:

> "Nor does the fact that the previous charges against the officers were not substantiated render them irrelevant for purposes of discovery. As to the two charges which were 'not sustained,' there were no witnesses to the event other than the complaining citizen and the officer. The department concluded that it could not fully resolve the issue on the basis of such evidence. Surely we cannot say that an interview with these complainants

> would be irrelevant to preparation of petitioner's defense. As to the charge of which [one officer] was exonerated, there were three civilian witnesses to that incident who contradicted the citizen who lodged the complaint. Presumably they will give petitioner's counsel the same version they told police investigators. If they do, counsel will undoubtedly choose not to use their testimony. [¶] The fact remains that under our constitutional system the burden for preparing a criminal defendant's case rests with his counsel, not with the police department. That burden cannot be properly discharged unless counsel has direct access to potential witnesses, for it is counsel who must decide if they can aid his client, not the police department's internal affairs division, however sincere and well motivated the latter may be." (*Id*. at pp. 829–830.)

Thus, under the relevant statutory and case authorities, complaints against law enforcement officers which are deemed unfounded or exonerated are subject to disclosure if otherwise relevant under *Pitchess*. The *Pitchess* statutory discovery procedures have been amended several times, which resulted in the enactment of the five-year disclosure limitation (see, e.g., *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1041–1042), but the Legislature has not excluded exonerated or unfounded complaints from disclosure, or limited the provisions of section 832.5, subdivision (c), that require retention of complaints that were deemed frivolous, unfounded or exonerated in a separate personnel file subject to disclosure under the *Pitchess* procedures set forth in Evidence Code section 1043.

As applied to this case, we find the trial court abused its discretion when it denied defendant's *Pitchess* motion as to the five complaints for excessive force filed against Officer Keener. In reaching this conclusion, however, we further find that defendant is not entitled to disclosure of confidential internal affairs reports, internal records about the investigation, or the conclusions of any officer who investigated the complaints filed under section 832.5. (Evid. Code, § 1045, subd. (b)(2); *City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 81–84; *Alford v. Superior Court*, *supra*, 29 Cal.4th at p. 1039.) "Typically, the trial court discloses only the names, addresses, and telephone numbers of individuals who have witnessed, or have previously filed complaints about,

similar misconduct by the officer. [Citation.] That practice 'imposes a further safeguard to protect officer privacy where the relevance of the information sought is minimal and the officer's privacy concerns are substantial.' [Citation.]" (*Warrick, supra,* 35 Cal.4th at p. 1019.) The statutory disclosure may include "the discipline imposed, without also requiring disclosure of how or why the investigating body reached that outcome." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55.)

If the court grants disclosure to the defense under *Pitchess*, there is no statutory authority to compel the defense or the trial court "to share with the prosecution the fruits of a successful *Pitchess* motion." (*Alford v. Superior Court, supra*, 29 Cal.4th at p. 1046.) However, the prosecution is entitled to statutory discovery from the defense, and may separately seek *Pitchess* disclosure. (*Alford v. Superior Court, supra*, at p 1046; *People v. Superior Court* (*Johnson*), *supra,* 61 Cal.4th at p. 858; §§ 1054.3, 1054.7.)

F. Conclusion

We find the court abused its discretion when it denied defendant's *Pitchess* motion for disclosure of information about the five excessive force complaints filed against Officer Keener. This determination requires the conditional reversal of defendant's convictions, with directions to the trial court to disclose the relevant information pertaining to the complaint, give defendant a reasonable opportunity to investigate the disclosed material, and file a motion for new trial where he would have the burden to demonstrate a reasonable probability of a different outcome if the evidence had been disclosed. Otherwise, the trial court shall reinstate the judgment.

In making a motion for new trial, defendant has a heavy burden to prove the court's erroneous denial of his pretrial *Pitchess* motion was prejudicial. His motion for new trial must be supported by any newly discovered evidence to show there is a reasonable probability that a different result would have occurred if the information had been disclosed prior to trial. (See, e.g., *People v. Hustead* (1999) 74 Cal.App.4th 410,

418–423; *People v. Johnson*, *supra*, 118 Cal.App.4th at pp. 304–305; *People v. Gaines*, *supra*, 46 Cal.4th at p. 176; *People v. Gill* (1997) 60 Cal.App.4th 743, 750–751.) In ruling on the new trial motion, the trial court may consider the credibility as well as the materiality of the evidence in determining whether introduction of the evidence in a new trial would render a different result reasonably probable. (*People v. Delgado* (1993) 5 Cal.4th 312, 329.)

II. The Court's Failure to Instruct Sua Sponte on Lesser Included Offenses

In counts I and III, defendant was charged and convicted of felony violations of section 69, obstructing or resisting Officer Keener and Ponce by means of threats or violence, and knowingly resisting the officers by the use of force or violence. The court did not instruct the jury on any lesser included offenses.

Defendant argues the court had a sua sponte duty to instruct the jury with the lesser included offenses of misdemeanor resisting arrest (§ 148, subd. (a)), and misdemeanor simple assault (§ 240). The People reply there was insufficient evidence to support instructions on any lesser included offenses.

As we will explain, the resolution of this question is dependent on section 69's unique definition of the charged offense, and the allegations in the accusatory pleading. We agree the court should have instructed on the lesser included offenses and find the error was prejudicial.

A. The Court's Sua Sponte Duty to Instruct

"A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1218, italics in original.)

"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever

evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162, italics in original.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.]" (*Ibid.*)

The court is not required "to instruct on necessarily included offenses when the evidence establishes that, if guilty, the perpetrator is guilty of the greater offense. [Citations.]" (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1589; *People v. Smith* (2013) 57 Cal.4th 232, 245 (*Smith*).)

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.]" (*People v. Cole*, *supra*, 33 Cal.4th at p. 1218.)

B. The Court's Instructional Ruling

During the instructional phrase, the trial court found there was insufficient evidence to support instructions on any lesser included offenses based on the trial testimony:

> "Based on the way that the testimony came in the court does not believe that there's substantial evidence that would allow a reasonable jury to conclude that the defendant was guilty of a crime, but only a misdemeanor [violation of section] 148. Specifically the officers' testimony, both officers, described conduct that involve a level of violence and resisting that would not be consistent with misdemeanor [section] 148 and with a felony [section] 69. And then when [defendant] testified, his testimony is basically a complete denial of any criminal activity, that he would not resist in any way, either feloniously or misdemeanor conduct. *So the court believes that a reasonable juror, based on the evidence before it, would have to either conclude that there was felony resisting or no resisting whatsoever*. So based on that the court is not instructing on a lesser included offenses." (Italics added.)

Defense counsel objected and requested instructions on misdemeanor resisting. The court overruled the objection, and the jury was not instructed on any lesser included offenses for the charged crimes.

C. The Elements of Section 69 and Defenses

Defendant contends that misdemeanor resisting arrest in violation of section 148, subdivision (a), and misdemeanor assault in violation of section 240, are both lesser included offenses of the charged crimes in counts I and III of felony resisting or obstructing an officer in violation of section 69, subdivision (a).

We must first address the elements of the "greater" offense as alleged in counts I and III. Section 69, subdivision (a) states:

> "Every person who attempts, *by means of any threat or violence*, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, *or who knowingly resists, by the use of force or violence*, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment." (Italics added.)

Section 69 "sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty. [Citation.]" (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 814; *Smith*, *supra*, 57 Cal.4th at p. 240; *People v. Brown* (2016) 245 Cal.App.4th 140, 151 (*Brown*).)

"The first way of violating section 69 'encompasses attempts to deter *either* an officer's *immediate* performance of a duty imposed by law *or* the officer's performance of such a duty at some time *in the future.*' [Citation.] The actual use of force or violence is not required. [Citation.]" (*Smith*, *supra*, 57 Cal.4th at p. 240, italics added.)

"The second way of violating section 69 expressly requires that the defendant resist the officer 'by the use of force or violence,' and it further requires that the officer was acting lawfully at the time of the offense. [Citation.]" (*Smith, supra,* 57 Cal.4th at p. 241.)

1. Defenses to a violation of section 69

A defendant cannot be convicted of violating section 69 against an officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time the alleged offense was committed. (*In re Manuel G., supra,* 16 Cal.4th at p. 815.) " 'The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties," for purposes of an offense defined in such terms, if the officer's conduct is unlawful.... [¶] [T]he lawfulness of the victim's conduct forms part of the corpus delicti of the offense.' [Citation.]" (*Id.* at p. 816; see *People v. Cruz* (2008) 44 Cal.4th 636, 673.) "[W]here excessive force is used in making what otherwise is a technically lawful arrest, the arrest becomes unlawful and a defendant may not be convicted of an offense which requires the officer to be engaged in the performance of his duties. [Citations.]" (*People v. White, supra,* 101 Cal.App.3d at p. 164; see *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 7 ["A peace officer is not 'engaged in the performance of his or her duties' ... if he arrests a person unlawfully or uses excessive force in making the arrest"].)

Under section 69, an officer must be acting lawfully when the resistance occurs. An officer using excessive force is not acting lawfully. Thus, the prosecution is required to prove beyond a reasonable doubt that the officers acted lawfully. (*In re Manuel G., supra,* 16 Cal.4th at p. 814; *People v. Olguin* (1981) 119 Cal.App.3d 39, 45.)

D. Lesser Included Offenses of Section 69

Defendant contends misdemeanor resisting arrest (§ 148, subd. (a)) and misdemeanor assault (§ 240) are lesser included offenses for a violation of section 69,

subdivision (a). The resolution of this question is dependent upon the unique definition of section 69 and the two ways it can be violated.

"We have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.)

1. Misdemeanor resisting

Section 148, subdivision (a)(1) defines the offense of misdemeanor resisting arrest and states:

> "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

Under the "statutory elements test," misdemeanor resisting arrest in violation of section 148, subdivision (a) "is not intrinsically a necessarily lesser included offense of section 69 because a defendant can violate section 69 in the first way, by attempting to deter an executive officer from performing a duty, without violating section 148, subdivision (a)(1)." (*Smith*, *supra*, 57 Cal.4th at p. 243.) In contrast, a person "who violates section 69 in the second way – by 'knowingly resist[ing], by the use of force or violence, such officer, in the performance of his duty' – also necessarily violates section 148(a)(1) by 'willfully resist[ing] … any public officer… in the discharge or attempt to discharge any duty of his or her office or employment.' [Citation.]" (*Id.* at p. 241.)

Under the "accusatory pleading test," misdemeanor resisting is not a lesser included offense of section 69 if the defendant is only charged with the first way of violating section 69. (*Smith*, *supra*, 57 Cal.4th at p. 242.)

However, if accusatory pleading charges the defendant with "*both ways* of violating section 69," then misdemeanor resisting in violation of section 148, subdivision (a) would be a necessarily included offense of the charged crime. (*Smith*, *supra*, 57 Cal.4th at p. 242, italics added.)

2. Misdemeanor assault

As for misdemeanor assault, that offense is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

Based on the two ways in which section 69 can be violated, "[a] person can violate section 69 in the first way without necessarily attempting to apply physical force," such that misdemeanor assault is not a lesser included offense of section 69 under the statutory elements test. (*Brown*, *supra*, 245 Cal.App.4th at p. 153.) In contrast, "it is not possible to violate the statute in the second way without committing an assault," such that assault is a lesser included offense of section 69. (*Id.* at p. 153.)

Under the accusatory pleading test, however, if the information alleges both ways of violating section 69 in "the conjunctive," then "assault [is] necessarily a lesser included offense of section 69 under the accusatory pleading test. [Citation.]" (*Brown*, *supra*, 245 Cal.App.4th at p. 153.)

3. The first amended information

Applying these principles to this case, the first amended information alleged as to counts I and III that defendant "did unlawfully attempt by means of threats or violence to deter or prevent" Officers Keener and Ponce "from performing a duty imposed upon such officer by law, *and* did knowingly resist by the use of force or violence said executive officer in the performance of his/her duty." (Italics added.)

As explained in *Smith* and *Brown*, under the accusatory pleading test, both misdemeanor resisting and misdemeanor assault were lesser included offenses of violating section 69 in this case since the amended information alleged both ways of violating section 69 "in the conjunctive." (*Brown, supra*, 245 Cal.App.4th at p. 153; *Smith, supra,* 57 Cal.4th at p. 242.) We further note that the jury was instructed only on the second way of violating section 69, that defendant "unlawfully used force or violence to resist an officer." (CALCRIM No. 2652)

The trial court thus had a sua sponte duty to instruct on both misdemeanor crimes if supported by substantial evidence.

E. Substantial Evidence of Lesser Offenses

The next question is whether there was substantial evidence to support the lesser included instructions on the misdemeanor offenses. We turn to two cases which are similar to the incident herein.

In *Smith, supra*, 57 Cal.4th 232, the prosecution evidence showed that the defendant, an inmate in the central jail, physically resisted and punched jail guards in two separate incidents. The accusatory pleading charged the defendant with both ways of violating section 69. The trial court denied the defendant's motion for an instruction on misdemeanor resisting (§ 148, subd. (a)) as a lesser included offense. The appellate court concluded that misdemeanor resisting was not a lesser included offense of section 69. (*Id*. at pp. 238–239.)

The California Supreme Court granted review and held that misdemeanor resisting arrest was a lesser included offense of the charged crime based on the accusatory pleading test, since defendant was charged with both ways of violating section 69. (*Smith, supra,* at pp. 244–245.) However, *Smith* concluded there was insufficient evidence to support the lesser included instruction.

> "In the April 21, 2008 incident, defendant physically resisted and punched the guard at the Men's Central Jail. In the September 11, 2008

> incident, defendant again physically resisted the guards and was subdued only after the deputies used Tasers and foam and rubber projectiles. Defendant was either guilty or not guilty of resisting the executive officers by the use of force or violence in violation of section 69. *There was no evidence that defendant committed only the lesser offense of resisting the officers without the use of force or violence in violation of section 148(a)(1).* [Citation.]" (*Smith, supra*, 57 Cal.4th at p. 245, italics added.)

A contrary result was reached in *Brown*, *supra*, 245 Cal.App.4th 140, which held the trial court committed prejudicial error by failing to instruct the jury that misdemeanor assault (§ 240) was a lesser included offense of violating section 69. The defendant was a 67-year-old African-American male, who was riding a bicycle on the sidewalk at dusk while wearing headphones and without a light, in violation of municipal code and Vehicle Code provisions. An officer yelled at him to stop, and the defendant tried to flee on his bicycle. The defendant was pursued by two officers, who were initially in patrol cars and then chased him on foot. The officers cornered him in a parking lot and used physical force to arrest him. The officers found cocaine in a bag that the defendant discarded during the chase. The defendant suffered a fractured rib and knots on his head. (*Id*. at pp. 145–146, 149.)

Brown explained that "[w]hat happened in the parking lot when the officers caught [the defendant] was a matter of some dispute," and the conflicting evidence was key to the court's ruling that the lesser included instruction should have been given. (*Brown, supra,* 245 Cal.App.4th at p. 146.) The officers testified they suspected the defendant was engaged in felony drug trafficking.

> "Officer Moody caught up to [defendant] first, yelled at him repeatedly to stop, and then tackled him, throwing him off of his bicycle, and taking him to the ground. [The defendant] 'aggressively' 'flipp[ed] back over' into a 'sitting position', and became combative, 'swinging his hands' with a 'clenched fist.' To get control of [the defendant] and protect himself, Officer Moody used his fist to hit [defendant] in the torso area with a 'compliance strike,*' but the punch had no effect and [the defendant] continued to swing at him*; at that point, Officer Ricchiuto came to Officer Moody's assistance, and, seeing [the defendant] reach for something in his

> waistband, delivered three 'compliance strikes,' one with his knee to [the defendant's] torso, and two with his fists to the side of [the defendant's] head. These blows caused [the defendant] to stop swinging and shield his head with his hands, a defensive move that finally brought him under control, since it allowed the officers to secure his hands and place him in handcuffs." (*Id.* at p. 146, italics added, fn. omitted.)

Brown further explained that the defendant's testimony about the incident was "quite different." (*Brown, supra*, 245 Cal.App.4th at p. 146.)

> "[The defendant] testified that he fell off his bicycle in the parking lot after hitting a curb. He claimed that, *without any kind of warning, and while he was facedown on the ground, not resisting and no longer fleeing*, one of the officers dived on his back with enormous force, 'like Superman,' pinning him down. That officer, angry and unprovoked, then proceeded to slug him in the head three times. In [the defendant's] telling, all the second officer did was handcuff him after he had been pummeled by the first officer. [The defendant] denied swinging at either officer. He testified, 'I wouldn't even try to – I couldn't win anyway, but no, I didn't.' " (*Id.* at pp. 146–147, italics added.)

The defendant in *Brown* was charged with felony resisting an officer in violation of section 69, along with two drug offenses. The jury was instructed with misdemeanor resisting as a lesser included offense. The defense theory was that the officers did not act lawfully when they arrested him because they used unreasonable and excessive force, and the jury received the appropriate instructions on that defense. The defendant was convicted of violating section 69, resisting by force or violence. (*Brown, supra*, 245 Cal.App.4th at pp. 149–150.)

Brown held that while the jury was instructed on misdemeanor resisting, the court also had a sua sponte duty to instruct on misdemeanor assault as another lesser included offense of the charged crime because the accusatory pleading charged the defendant with both ways of violating section 69. (*Brown, supra*, 245 Cal.App.4th at p. 153.) *Brown* further held there was substantial evidence to support the instruction, based on the defendant's argument that by failing to instruct on misdemeanor assault, the jury did not have "the option of finding that both versions of the facts were partly true. He points out,

for example, that even if the jury believed he swung at the officers, the jury could have found the officers unnecessarily initiated the violence by jumping on him and beating him as he lay prone on the ground, prepared to surrender." (*Id*. at pp. 150–151.)

Brown rejected the People's claim that the instruction was not supported by substantial evidence because the jury had the choice of either believing the prosecution evidence that the defendant forcibly resisted the officers and they used reasonable force, and convicted him of felony resisting; or believing the defendant's story that he did not resist and the officers used excessive force, which would have resulted in an acquittal. (*Brown*, *supra*, 245 Cal.App.4th at pp. 150–151, 153.)

> "[T]he jury was not required to choose and fully credit only one of the two versions of the November 2011 incident that were presented to it. For example, the jury could also have concluded that [the defendant] used excessive force or violence to resist arrest only in response to the officers' unreasonable force. Under that scenario, [the defendant] could have been found not guilty of the section 69 violation, but still guilty of the lesser crime of assault." (*Id.* at pp. 153–154.)

Brown concluded the court erred by failing to instruct on simple assault as a lesser included offense because there was substantial evidence to support the instruction, and " 'the most plausible interpretation of the evidence' " was that "there was improper or excessive use of force on both sides." (*Brown*, *supra*, 245 Cal.App.4th at pp. 154, 155.)

> "[T]he jury could have, on the one hand, believed [the defendant's] testimony that he did not resist the officers before he fell or was pushed off his bike and was then tackled and slugged by Officer Moody while face-down on the ground, unresisting and ready to surrender – a scenario that would have made the arrest unlawful due to excessive force. The jury could still, on the other hand, have accepted the officers' testimony that [the defendant] wheeled and repeatedly swung at them, striking both officers. If the jury concluded that [the defendant's] reaction was unreasonable, that would have supported an assault conviction." (*Id*. at p. 154.)

Brown explained that if the jury concluded the defendant used reasonable force when he swung at the officers, that would have supported a conviction for simple assault instead of forcible resisting to lawful police conduct. (*Brown, supra,* 245 Cal.App.4th at

p. 154.) *Brown* further held the instructional error was prejudicial and there was a reasonable probability the error affected the outcome of the case. "The use of excessive force was a primary defense theory at trial and there was substantial evidence to support it. But the instructional error precluded the jury from finding that the officers used excessive force, while convicting [the defendant] of assault for swinging at the officers in a manner that could have injured them, whether he intended to cause injury or not. A 'jury without an option to convict a defendant of a lesser included offense might be tempted to convict the defendant of an offense greater than that established by the evidence instead of rendering an acquittal.' [Citation.]" (*Id*. at pp. 154–155.) The jury convicted the defendant of a lesser included offense on the drug charge, which indicated that "it had doubts about the prosecution's case which might also have affected its resolution of the section 69 charge. [Citation.]" (*Id*. at p. 155.)

1. Analysis

As applied to this case, both defendant and the People agree that, based on the accusatory pleadings test, defendant was charged with both ways of violating section 69. They also agree that under these circumstances, misdemeanor resisting arrest and misdemeanor assault were lesser included offenses of counts I and III. They obviously disagree as to whether substantial evidence supported the lesser included offenses to trigger the court's sua sponte duty to instruct. (*Smith*, *supra,* 57 Cal.4th at pp. 240–243; *Brown*, *supra*, 245 Cal.App.4th at pp. 152–153.)

As explained above, the court is not required "to instruct on necessarily included offenses when the evidence establishes that, if guilty, the perpetrator is guilty of the greater offense. [Citations.]" (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1589; *Smith*, *supra*, 57 Cal.4th at p. 245.) The People assert this situation was present in this case because the testimony from Officers Keener and Ponce showed that defendant resisted with force or violence so that he was guilty of the greater offense if he was guilty at all, and the jury would have otherwise found him not guilty if it believed defendant's

contrary testimony. Indeed, the officers testified to defendant's violent resistance that included his attempts to remove Keener's gun, his refusal to obey repeated orders to comply, his continuation of the assault even after he was hit by the Taser, and his threat to kill Keener.

In contrast, defendant testified he never resisted Officer Keener's attempt to conduct a parole search, and that Keener suddenly and violently threw him to the ground for no reason. Defendant testified he did not struggle with Keener, but that Keener punched and kneed him in the head, and that Keener used unreasonable and excessive force against him. Defendant further testified he involuntarily kicked his legs when he was hit by the Taser. Defendant conceded he might have inadvertently touched the grip of Keener's gun, but denied that he tried to remove the gun or threatened to kill Keener, and claimed Keener threatened to kill him.

Defendant argues Rosalinda Cortez's trial testimony supported both lesser included misdemeanor instructions because she testified defendant could not have reached for Officer Keener's gun, and he was not violently resisting the officers. However, Cortez admitted she did not see the initial encounter between defendant and Keener, or hear their conversation, because she was preoccupied with preventing Officer Ponce from finding her methamphetamine pipe. Cortez was unable to testify whether defendant submitted to the search and Keener suddenly threw him to the ground, or Keener directed defendant to submit to the search and defendant violently resisted him. By the time she turned around, the struggle had already begun.

Cortez insisted that defendant could not have reached for Officer Keener's gun, and she never saw the officers hit or kick him. Her account was refuted by defendant's own testimony, when he described how Keener punched and kicked him, and he admitted that his hand inadvertently touched the diamond-grip of Keener's gun. Aside from credibility issues, defendant's testimony demonstrates that Cortez did not see the key

moments of the incident such that Cortez's testimony did not provide substantial evidence to support the lesser included instructions.

Aside from Cortez's testimony, however, it appears that defendant's own testimony would have support lesser included instructions for misdemeanor assault based on the analysis in *Brown*. As in *Brown*, the jury in this case could have believed aspects of the testimony from both the officers *and* defendant – that he unlawfully resisted Officer Keener at the beginning of the parole search, but that he threw punches and tried to break free in response to Keener's alleged use of excessive force. " '[W]hen excessive force is used by a defendant in response to excessive force by a police officer … defendant [may] be convicted, and then the crime may only be a violation of section 245, subdivision (a) or of a lesser necessarily included offense within that section,' such as section 240. [Citation.] [I]f the jury found that [the defendant] used unreasonable force in swinging at the officers it would have supported a conviction for 'simple assault rather than forcible resistance to lawful police conduct under section 69….' " (*Brown, supra,* 245 Cal.App.4th at p. 154.)

A similar analysis would also find substantial evidence to support the instruction for misdemeanor resisting (§ 148, subd. (a)) as a lesser included offense since the jury could have partially relied on defendant's testimony to find he "willfully resist[ed]" the officers' alleged use of excessive force, but not by the use of force or violence. (*Smith, supra,* 57 Cal.4th at p. 241.)

"The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony, of any of the above witnesses. [Citations.] They might have believed part of what the officers said and part of what [defendant] said. They therefore might have found that [defendant] acted unlawfully [in response to the officer's commands], but he did not use force unlawfully because his use of force was a response to [the officer's] unlawful use of force." (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 261, disapproved on other grounds by *Smith, supra,* 57 Cal.4th at p. 242.)

It thus appears that based upon the standard set forth in *Brown*, there was substantial evidence to support the lesser included instructions for misdemeanor assault and misdemeanor resisting.

F. Prejudice

The erroneous failure to instruct on a lesser included crime is prejudicial if it is reasonably probable that defendant would have obtained a more favorable result absent the error. (*People v. Moye* (2009) 47 Cal.4th 537, 555–556.) However, an "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

It could be argued the error is harmless because the factual questions that would have been posed by the misdemeanor instructions were resolved against defendant by the entirety of the instructions. In count II, defendant was charged and convicted of attempting to take Officer Keener's firearm from its holster (§ 148, subd. (d)). While defendant testified he inadvertently touched Keener's gun grip, the jury's guilty verdict indicates that it gave credence to the testimony from Keener and Ponce that defendant intentionally tried to remove Keener's firearm from his holster.

However, defendant was also charged with making criminal threats to Officer Keener, based on Keener's testimony that as defendant tried to grab his gun, he told Keener that "if I let him go, he's going to kill me and that he was not going back to prison." The jury was unable to reach a verdict on the criminal threats charge, which could have been because it rejected and disbelieved this portion of Keener's testimony.

It is a close question, but the evidence in this case is almost identical to that presented in *Brown*, such that the court should have given the instructions on the lesser included offenses, and the error is prejudicial.

As in *Brown*, we will conditionally reverse defendant's convictions in counts I and III. " 'When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense.' [Citations.]" (*Brown*, *supra*, 245 Cal.App.4th at pp. 155–156.) On remand, if the prosecutor does not retry defendant for counts I and III, the trial court is directed to modify the judgment to reflect a conviction of the lesser included offenses of simple assault in violation of section 240. (*Id*. at p. 173.)

III. Impeachment of Defendant's Testimony with his Prior Misdemeanor Conviction

We now turn to the evidentiary issues raised in defendant's appeal for guidance on remand if defendant is retried or a new trial is granted.

Defendant contends the court committed prejudicial error when it granted the prosecution's motion to impeach his trial testimony with the fact of his misdemeanor conviction for resisting arrest in 2005. Defendant argues that only the conduct underlying a misdemeanor conviction is admissible for impeachment while the fact of the conviction is inadmissible. Defendant asserts the court also abused its discretion because his prior conviction for resisting was not for an act of moral turpitude, and it was too similar to the charged offenses.

The People reply that defendant forfeited review of the court's admission of the fact of the misdemeanor conviction, and whether it was an offense of moral turpitude, because he failed to raise these objections. The People argue defendant only preserved review of his objection that the prior conviction was too similar to the charged offense, and further argue that similar prior convictions are admissible for impeachment.

A. Impeachment with Felony and Misdemeanor Convictions

The credibility of a defendant who testifies at trial may be impeached by any prior *felony* conviction that necessarily involves moral turpitude, subject to the trial court's exercise of discretion pursuant to Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306, 317; *People v. Gabriel* (2012) 206 Cal.App.4th 450, 456.) "Crimes involve moral turpitude when they reveal dishonesty, a ' "general readiness to do evil," ' ' "bad character," ' or 'moral depravity.' [Citation.]" (*People v. Gabriel*, *supra*, 206 Cal.App.4th at p. 456.) Whether a conviction involves moral turpitude is a question of law. (*People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1017.)

In contrast to felony convictions, the *fact* of a prior misdemeanor conviction is inadmissible hearsay when offered to impeach the defendant's credibility. (*People v. Chatman* (2006) 38 Cal.4th 344, 373; *People v. Wheeler* (1992) 4 Cal.4th 284, 288, 298–299 (*Wheeler*).) However, evidence of the defendant's *underlying conduct* which resulted in a misdemeanor conviction is admissible to impeach his credibility if that conduct amounted to moral turpitude, subject to the court's discretion under Evidence Code section 352. (*Wheeler*, *supra*, 4 Cal.4th at p. 295.)

B. The Court's Evidentiary Rulings

On the first day of trial, the court reviewed the parties' evidentiary motions. The prosecutor moved to impeach defendant's expected trial testimony with the following list of his "prior felony convictions," but this list also included misdemeanor convictions:

> (1) a misdemeanor conviction for malicious mischief in Indiana in 1999;
>
> (2) a misdemeanor violation of section 148, subdivision (a)(1) in Sacramento County in 2005 (resisting/obstructing an officer without force or violence);[16]

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[16] Defendant's prior conviction was for a violation of section 148, subdivision (a)(1), misdemeanor resisting arrest, which we defined in section I, *ante*.

(3) a misdemeanor violation of section 243, subdivision (e)(1) in Fresno County in 2009 (battery on a spouse or cohabitant);

(4) a felony violation of former section 12020, subdivision (a) in Fresno County in 2009 (carrying a concealed dirk or dagger); and

(5) a misdemeanor violation of section 273.5 in Fresno County in 2009 (willful infliction of corporal injury on a spouse or cohabitant).

The prosecutor asserted that violations of section 273.5 and section 12020 were offenses of moral turpitude. The prosecutor did not cite any authorities in support of the assertion that misdemeanor resisting was an offense of moral turpitude.

The court stated that it would exclude impeachment of defendant's testimony with his misdemeanor conviction for malicious mischief in Indiana in 1999 because it was too remote to have any probative value.

The court also stated defendant's "other four" convictions were admissible only to impeach defendant's trial testimony. The court clarified these convictions were for "the [section] 148 from 2005, a misdemeanor domestic violence from 2009, the felony weapons charge from 2009, and the misdemeanor domestic violence from 2009." The court further held all four "convictions" were "crimes of moral turpitude and are close enough in time to have probative value that is not outweighed by any prejudicial impact."

Defense counsel objected to the admission of the section 148 conviction for resisting arrest because it was very similar to the two charged counts of felony resisting in violation of section 69, it was too prejudicial, and the jury would judge defendant based on that prior conviction and not the facts of this case. The court overruled the objection.

The court then turned to defendant's trial brief, which sought to exclude any evidence of his "prior bad acts or convictions," "specific conduct," and "other crimes." Defendant argued such evidence was prohibited by Evidence Code section 1101, subdivision (a) and would be highly prejudicial.

The court acknowledged defendant's motion to exclude his prior bad acts, but clarified that it had already ruled on the admissibility of that evidence when it partially granted the prosecutor's motion. The court again held that "the prior convictions previously referenced are able to be used for impeachment purposes only but there's not to be any reference to alleged prior bad acts or convictions of the defendant in the People's case in chief."

Defendant did not argue in either his motion or before the court that the fact of his prior misdemeanor conviction for resisting arrest could not be used to impeach him, or that his underlying conduct which resulted in that conviction did not amount to moral turpitude.

C. Defendant's Testimony About his Prior Convictions

When defendant took the stand, defense counsel began the direct examination by asking defendant about his status as of February 19, 2012, the date of the charged offenses. Defendant testified he was on parole for a weapons charge and wore an ankle monitor.

Defense counsel asked defendant about his prior convictions:

"Q You've also been convicted of some charges before, correct?

"A Yes.

"Q Okay. Just you have – you have a misdemeanor [violation of section] 148 from 2005?

"A Yes.

"Q And you have a [violation of] Penal Code [section] 243(e) from 2009?

"A Yes.

"Q And also – and I'm sorry. That's as a misdemeanor?

"A Which one was that did you say?

"Q The last one, the [section] 243(e) from 2009?"

The court interrupted and told defense counsel that "those numbers" would be "fairly meaningless for the jury." Defense counsel continued:

"Q Okay. Is it true that you have three prior misdemeanors and one prior felony?

"A Yes.

"Q Spread out from 2005 to 2009

"A Yes.

"Q And the convictions are for delaying for obstructing a police officer, a domestic violence case and a gun charge?

"A Correct."

Also on direct examination, defendant testified the incident with Officer Keener felt like a betrayal because his father was a police officer, and he was always told to trust and support police officers. On recross-examination, the prosecutor addressed this point and asked: "[Y]ou talk about how much you respect law enforcement …. Isn't it true that you were previously convicted of resisting arrest in 2005?" Defendant said yes.

D. Instructions and Rebuttal Argument

The court instructed the jury with CALCRIM No. 316, on considering felony convictions to impeach defendant's credibility:

> "If you find that a witness has been convicted *of a felony* you may consider that fact in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight … of that fact and whether that fact makes the witness less believable." (Italics added.)

In her rebuttal argument, the prosecutor attacked defendant's credibility and advised the jury to review CALCRIM No. 316 about how to consider the fact of a witness's prior felony conviction:

> "[I]f you find that a witness has been convicted of a felony you may consider that fact in evaluating the credibility of the witness's testimony….

> [¶] I'm not telling you how to weigh it. You decide. Has he been convicted before? Yes. And you get to know that because somebody doesn't get to come testify under a cloak of veracity, right? *We talked about the four convictions and one of which was a resisting arrest. One of which was a [section] 148.* So the suggestion by defense counsel that he has never done something like this is for you to consider." (Italics added)

Defense counsel did not object to this argument, and did not request an instruction on the consideration of misdemeanor conduct, such as CALCRIM No. 2.23.1, which states:

> "Evidence showing that a witness, _____, engaged in past criminal conduct amounting to a misdemeanor may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

E. Impeachment with Fact of Prior Misdemeanor Conviction

Defendant argues the court erroneously permitted the prosecution to impeach his trial testimony with the fact of his prior misdemeanor conviction for resisting arrest in violation of section 148, that such a conviction is not an offense of moral turpitude, only his underlying conduct was admissible, and the prosecution never introduced evidence of such conduct to determine if it constituted moral turpitude. Defendant also renews the argument he made to the trial court, that impeachment with that prior conviction was prejudicial because it was too similar to the charged offenses in this case.

The People assert defendant has forfeited any challenge to the court's ruling that the misdemeanor violation of section 148 could be used to impeach his trial testimony. The People point to defendant's initial testimony on direct examination, when he admitted he was on parole and that he had several prior convictions, and argue that defendant never objected to the admission of his prior misdemeanor conviction, and instead sought to affirmatively introduce this evidence to obtain a tactical advantage.

We reject the People's broad claim that defendant never challenged the court's decision to admit his prior convictions for impeachment. As set forth above, defendant's trial brief sought to exclude evidence of his "prior bad acts or convictions," "specific conduct," and "other crimes." The court overruled defendant's objections and granted the People's motion to permit impeachment with his prior convictions. In light of the court's evidentiary ruling, the record suggests defense counsel made the reasonable tactical decision to begin defendant's direct examination testimony with his admissions about his parole status and prior convictions. Given defendant's objections in his trial brief, the tactical decision to admit the prior convictions before the jury did not constitute forfeiture of the entirety of the court's evidentiary ruling on the prior convictions.

While defendant generally objected to the admission of his prior convictions, however, we cannot ignore the limited basis upon which the objection was made, and why the prosecution did not present evidence about his underlying conduct. Defendant never argued that misdemeanor convictions constituted hearsay and could not be used to impeach his testimony, or that impeachment was limited to the underlying conduct leading to the misdemeanor conviction.

The identical situation was addressed in *Wheeler*, which held the prosecutor's impeachment of the defense witness with the fact of a misdemeanor conviction constituted inadmissible hearsay evidence. (*Wheeler*, *supra*, 4 Cal.4th at p. 300.) *Wheeler* concluded, however, that the defendant in that case "waived any hearsay claim by making no trial objection on that specific ground. [Citations.] Accordingly, admission of [the witness's] misdemeanor conviction to impeach her credibility cannot serve as grounds for reversal of the judgment against defendant." (*Id*. at p. 300, fn. omitted.)[17]

[17] We note that Evidence Code section 452.5 was subsequently enacted in light of *Wheeler* to create an exception to this hearsay rule. It allows prior misdemeanor conduct to be proved by official records of misdemeanor convictions. (*People v. Duran* (2002) 97

A similar result was reached in *People v. Cadogan* (2009) 173 Cal.App.4th 1502, where the prosecutor impeached the defendant with questions about his prior misdemeanor convictions, and did not ask about his prior conduct. Defense counsel did not raise any hearsay objections. "Defendant's appeal of this issue is noncognizable. Had defendant raised a timely objection, the prosecutor could have rephrased her questions to ask defendant about past conduct bearing on his credibility rather than the fact that he had suffered specific misdemeanor convictions." (*Id*. at p. 1515.)

In this case, defendant never argued that the fact of his prior misdemeanor conviction was inadmissible hearsay, and that only his underlying conduct was admissible to impeach his trial testimony. If such an objection had been raised, then the prosecutor would have been compelled to introduce evidence about defendant's underlying conduct.

It is conceivable that defense counsel made the tactical decision not to raise a hearsay objection to avoid introducing evidence of defendant's actual conduct. The fact of defendant's misdemeanor conviction for resisting may have been less prejudicial than evidence about the actual conduct that led to that conviction. (Cf. *People v. Shea* (1995) 39 Cal.App.4th 1257, 1265.)

In any event, we are compelled to conclude that defendant's failure to raise a hearsay objection has forfeited review of the court's ruling which allowed the prosecutor to impeach defendant with the fact of his prior misdemeanor conviction.

Cal.App.4th 1448, 1460.) In addition, a trial court may rely on such evidence to take judicial notice that a defendant had pleaded guilty to a misdemeanor offense. (*People v. Lee* (2011) 51 Cal.4th 620, 650–651.) In this case, however, no official record of defendant's misdemeanor conviction was offered into evidence. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522, fn. 8.)

F. Moral Turpitude

Defendant next contends that the court also committed error in permitting impeachment with the fact of his prior misdemeanor conviction for violating section 148 because that offense is not a crime of moral turpitude.

As explained above, *Wheeler* held that only "nonfelony *conduct* involving moral turpitude should be admissible to impeach a criminal witness." (*Wheeler*, *supra*, 4 Cal.4th at p. 295, italics added.) "Misconduct involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited conduct which resulted in a felony conviction." (*Id*. at pp. 295–296.)

"Moral turpitude is conduct that indicates dishonesty, bad character, a general readiness to do evil, or moral depravity of any kind. [Citations.]" (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556.) A crime of moral turpitude also includes " 'conduct involving violence, menace, or threat.' [Citations.]" (*People v. Williams* (1999) 72 Cal.App.4th 1460, 1464.) Simple battery is not a crime of moral turpitude because it could result from the "least touching." (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88.) In contrast, battery on a peace officer is a crime of moral turpitude. (*People v. Lindsay* (1989) 209 Cal.App.3d 849, 857; *People v. Clarida* (1987) 197 Cal.App.3d 547, 552.)

As discussed in section I, *ante*, section 69 defines the offense of felony resisting an executive officer by force or violence, and is also a crime of moral turpitude. "[A]ny violation of section 69 involves (1) threats, violence, or force, directed toward (2) an executive officer." (*People v. Williams*, *supra*, 72 Cal.App.4th at p. 1464, fn. omitted.)

Whether misdemeanor resisting arrest in violation of section 148 is an offense of moral turpitude "has not been determined in the reported cases." (*People v. Williams*, *supra*, 72 Cal.App.4th at p. 1462, fn. 3.) " 'The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or

her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citations.]' [Citation.] The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence. [Citation.]" (*In re Muhammed* C. (2002) 95 Cal.App.4th 1325, 1329.)

"Section 148 is most often applied to the physical acts of a defendant. [Citation.] For example, physical resistance, hiding, or running away from a police officer have been found to violate section 148. [Citations.] But section 148 'is not limited to nonverbal conduct involving flight or forcible interference with an officer's activities. No decision has interpreted the statute to apply only to physical acts, and the statutory language does not suggest such a limitation.' [Citation.]" (*In re Muhammed C., supra,* 95 Cal.App.4th 1325, at pp. 1329–1330.)

While a conviction of section 148 may be based on nonphysical conduct, it is certainly conceivable that a person could engage in physical acts of resistance or struggle with an officer in such a way as to demonstrate the threat of violence and constitute an act of moral turpitude.

However, defendant's failure to raise a moral turpitude challenge forfeits appellate review of that argument. (*People v. Marks* (2003) 31 Cal.4th 197, 228–229.) As with his hearsay argument, defendant never raised this issue before the trial court, and he never argued that his underlying conduct did not constitute moral turpitude. Since defendant failed to argue in the trial court that his prior acts which led to the misdemeanor conviction did not necessarily involve moral turpitude, the prosecution did not have the opportunity to present evidence about his underlying conduct, and he cannot raise this argument for the first time on appeal.

G. Impeachment with Similar Prior Conviction

We are thus left with the only issue which defendant preserved below – whether impeachment with a misdemeanor violation for resisting arrest was prejudicial because it was too similar to the charged offenses in this case of knowingly resisting the officers by means of threats or violence (§ 69), and attempting to take an officer's firearm from its holster (§ 148, subd. (d).

"While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible" considering both the relevance and potential prejudicial impact of the evidence. (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.) " 'The identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercise its discretion.' [Citation.] [T]he admission of multiple identical prior convictions for impeachment is not precluded as a matter of law [citation], and a series of crimes may be more probative than a single crime …. [Citation.]" (*People v. Green* (1995) 34 Cal.App.4th 165, 183; see *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647 [three prior convictions for burglary admitted in prosecution for burglary].)

The mere fact that the prior conviction was similar to the charged offense did not render the impeachment evidence prejudicial. As noted above, the jury only heard the fact of the prior misdemeanor conviction, and defendant's failure to raise a hearsay objection may have been based on the tactical decision to prevent the jury from hearing evidence of his underlying conduct that led to his conviction for resisting arrest. We conclude the court did not abuse its discretion when it permitted the prosecutor to impeach the defendant in this manner.

IV. <u>Prosecutorial Misconduct – The Toxicology Report</u>

Defendant raises two claims of prosecutorial misconduct based on (1) the prosecutor's cross-examination of defendant about a toxicology report; and (2) the

prosecutor's questions to Sergeant Boyer when he testified as a rebuttal witness. We will separately consider these arguments.

In this section, we will address defendant's argument that the prosecutor committed prejudicial misconduct during the sequence of cross-examination when she used a toxicology report to impeach defendant's trial testimony about his methamphetamine use. Defendant argues the prosecutor improperly used cross-examination to introduce inadmissible evidence through her questions.

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" (*People v. Cole, supra,* 33 Cal.4th at p. 1202; *People v. Clark* (2011) 52 Cal.4th 856, 960.)

"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Tully* (2012) 54 Cal.4th 952, 1009–1010.)

A. Background

As noted in the factual statement, Sergeant Boyer briefly interviewed defendant at the scene after he was taken into custody. The entirety of the record reflects that after defendant was arrested in this case, he submitted a blood sample, it tested positive for methamphetamine, and a toxicology report was produced.

The potential admission of the toxicology report and/or the results of the blood test was not addressed in the parties' pretrial motions. The prosecutor did not introduce any direct evidence that a blood sample was taken that night, or about the results of the blood test. Defendant did not raise any preliminary objections to this evidence. The court did not make any exclusionary rulings about defendant's blood test or the results prior to defendant's trial testimony.

B. Evidence About Defendant's Drug Use

At trial, Officer Keener testified the incident with the three people in the parked car began at 7:30 p.m. on February 19, 2012, and he contacted defendant shortly after he detained the occupants of the car.

Defendant testified on direct examination that he regularly used methamphetamine at the time of the incident. He last ingested methamphetamine around 3:00 a.m. on February 19, 2012. Defendant testified that when he took methamphetamine, he usually stayed up all night, and became tired and sleepy if he did not use any more methamphetamine that day.

Defendant testified that when he left the apartment, just before Officer Keener called out to him, he was starting to become tired from his earlier use of methamphetamine. However, defendant also testified that when he talked to Sergeant Boyer after he was arrested, he was "high" and confused because of his drug use.

C. Cross-examination About the Toxicology Report

Defendant's claim of prosecutorial misconduct is based on the following sequence when the prosecutor cross-examined him at trial. The prosecutor asked defendant about his drug use. Defendant again testified he used methamphetamine at 3:00 a.m. The prosecutor produced a report that contained defendant's toxicology results and asked defendant to review it.

"Q And do you know what that is?

"A Looks like the toxicology levels.

"Q Okay. And if you know, are those your toxicology levels?

"A I could only tell by the paper. I would say if this is what it says, yes.

"Q And do you know what your levels were when your blood was taken that night?"

Defense counsel raised hearsay and foundation objections. The court replied the question was whether defendant knew his levels, and directed him to answer.

"[Defendant] At the time I knew what I took earlier. I don't know how much it was.

"Q Okay. But you've seen this document before?

"A Yes.

"Q Okay. And you see that it indicates what your levels are?

"A Yes.

"Q Okay. And do you know what that amount was?"

Defense counsel again raised hearsay and foundation objections. The court held the question was still whether defendant knew, and directed the prosecutor that "to that limited extent you can reask the question."

"Q … Do you know what your levels were when that test was taken?

"A I don't know the exact levels.

"Q But you have seen that document?

"A Yes.

"Q And does it indicate what your levels are?

"A Yes.

"Q Would looking at that document help refresh your recollection?

"A Well, do you want me to say the amount that's on here?"

Defense counsel again raised hearsay and foundation objections. The court directed defendant not to "read it off the document," but only to review the document to see if it "refreshes your recollection as to what your levels are, then you can use it to refresh your recollection." Defendant testified: "Well, I did not know what my levels were at the time."

The prosecutor continued:

> "Q. *Okay. Would it surprise you if I told you that your levels were .40 milligrams of methamphetamine*?
>
> "A *No*.
>
> "Q *Okay. Would it surprise you to know that that's in the potentially toxic range*?
>
> "A *I wouldn't know that*." (Italics added.)

Defense counsel did not object to this exchange. The prosecutor continued.

> "Q *Okay. Would it also surprise you to know that it would be highly unlikely for you to have used meth at 3:00 a.m. and have those levels when your blood was drawn sometimes after 8:00 p.m.*?" (Italics added.)

Defense counsel objected based on foundation and facts not in evidence. The court directed defendant not to answer, sustained the objection, and noted the question also called for speculation. The prosecutor moved on to another subject and did not ask further questions about the toxicology report.

Defense counsel never argued the prosecutor committed misconduct during these exchanges or requested an admonition.

D. Analysis

Defendant relies on the cross-examination sequence set forth above, and argues the prosecutor committed misconduct because she used to toxicology report to ask questions that "she knew would elicit inadmissible hearsay evidence," and "she essentially attempted to testify herself as to the evidence contained in the report…."

"It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citation.]" (*People v. Bonin* (1988) 46 Cal.3d 659, 689, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Pinholster* (1992) 1 Cal.4th 865, 943, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) It is also misconduct "for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]" (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.)

We note, however, the court never addressed the admissibility of the toxicology report prior to this cross-examination sequence. The prosecutor was not violating any existing evidentiary orders when she asked defendant about the test results. It is possible the prosecutor was trying to determine if defendant had personal knowledge of his methamphetamine levels, particularly since defendant admitted he had seen the report and he was familiar with the results.

In any event, defendant has forfeited this claim on appeal. As explained above, "[i]t is well settled that making a timely and specific objection at trial, and requesting the jury be admonished …, is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal. [Citations.] 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.)

Defendant asserts that he raised several objections to the prosecutor's questions about the toxicology report. However, defendant's objections were limited to hearsay and foundational issues. He never raised a prosecutorial misconduct objection or asked the court for appropriate admonitions during this sequence. "[T]here is no requirement that those words [prosecutorial misconduct] must be said in front of the jury. Defense counsel can object and ask to approach the bench, where the specific objection can be made outside the presence of the jury [citation] or object to the particular conduct and

later, out of the presence of the jury, raise the issue of misconduct [citation]." (*People v. Ward* (2009) 173 Cal.App.4th 1518, 1527–1528.) Defendant failed to do so in this case, and his evidentiary objections did not preserve review of the prosecutor's alleged misconduct.

Defendant relies on *People v. Guerra* (2006) 37 Cal.4th 1067, and argues his evidentiary objections adequately preserved his claim of prosecutorial misconduct. In that case, the trial court repeatedly overruled the defendant's objections that the prosecutor's questions were "argumentative." *Guerra* held the prosecutor did not commit misconduct without addressing whether the objections preserved the issue. (*Id*. at pp. 1124–1125, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) However, objections based on argumentative questions necessarily mean the prosecutor has asked "questions designed to engage the witness in an argument rather than to elicit facts within the witness's knowledge," which implicates a claim of prosecutorial misconduct. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755, abrogated on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391.)

Defendant further asserts that he should be excused from his failure to object and request admonitions because "immediately after the prosecutor spoke, the 'damage was done' such that 'an admonition would not have cured the harm caused by the misconduct.' " " 'A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if " 'an admonition would not have cured the harm caused by the misconduct.' " [Citation.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." ' [Citation.]" (*People v. Seumanu*, *supra*, 61 Cal.4th at pp. 1328–1329.)

None of these circumstances were present during the above-quoted sequence of cross-examination. When defendant raised hearsay and foundational objections, the court sustained the objections and directed defendant not to respond to particular questions. The court never made any statements or rulings that would have prevented defendant from raising prosecutorial misconduct objections or requesting admonitions. Defendant's objections to the prosecutor's questions were "largely technical objections such as inadequate foundation and hearsay. Moreover, defense counsel's objections were repeatedly sustained. Thus, even assuming that his claim is not forfeited by his failure to have objected to these questions on the ground of prosecutorial misconduct [citation], he fails to demonstrate the inadequacy of the remedy he did receive when his various objections were sustained." (*People v. Tully*, *supra*, 54 Cal.4th at p. 1015; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 755.)

Finally, even if defendant preserved the issue and the prosecutor committed misconduct, we find there was no prejudice based on defendant's own trial testimony. Defendant initially testified that he was becoming tired from his previous use of methamphetamine at the time that Officer Keener stopped him. On further questioning, however, defendant contradicted himself and testified that when Sergeant Boyer interviewed him after the incident, he was still "high" and confused as a result of his drug use.

V. Prosecutorial Misconduct – Sergeant Boyer's Testimony

Defendant's second claim of prosecutorial misconduct is based on the prosecutor's motion to call Sergeant Boyer as a rebuttal witness. Defendant argues the court permitted the prosecutor to call Boyer but imposed evidentiary limitations on his testimony. Defendant asserts the prosecutor asked Boyer questions that went beyond the scope of the court's evidentiary ruling and were intended to elicit inadmissible evidence.

A. Background

As noted above, the record shows that Sergeant Boyer responded to the scene after defendant was arrested, and conducted a brief interview with him.

During the pretrial evidentiary motions, the prosecutor stated defendant gave a "civil liability statement" to Sergeant Boyer after he was arrested. The prosecutor requested to use defendant's post-arrest statements to impeach his expected trial testimony.

The court stated that defendant was in custody when he gave that statement and he was not advised of the *Miranda* warnings. The court held that defendant's statements were obtained in violation of *Miranda* and were not admissible in the People's case in chief.

However, the court also held there was no evidence that defendant's statements were involuntary or the result of coercive interrogation, and his prior statements could be used for impeachment if he testified at trial.[18]

B. Delayed Disclosure of Defendant's Postarrest Statement

On the scheduled first day of evidence, defense counsel advised the court that she had just received a copy of the recording and transcript of defendant's postarrest statement to Sergeant Boyer. Defense counsel needed time to review this evidence before it was admitted. The prosecutor said she thought the evidence had already been provided to defense counsel, and sent the materials to her that morning.

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[18] A statement obtained in violation of *Miranda* may not be introduced by the prosecution in its case-in-chief, but if the statement is otherwise voluntary, it may be used to impeach defendant's credibility if he or she testifies differently at trial. (*Harris v. New York* (1971) 401 U.S. 222, 225–226; *People v. Coffman and Marlow*(2004) 34 Cal.4th 1, 55.)

The court stated this matter should have been previously addressed, and it was not going to make the jury wait. The court said it would consider the admissibility of the evidence at the appropriate time.

C. The Court's Ruling on Defendant's Postarrest Statement

In the midst of the prosecutor's cross-examination of defendant, the prosecutor advised the court (outside the jury's presence) that she was going to further impeach defendant's testimony by playing the audiotape of defendant's postarrest statement to Sergeant Boyer. Defense counsel objected because the prosecutor had failed to timely turn over the transcript.

The court denied the prosecutor's request to play the recording of defendant's postarrest statements because she had violated a local rule requiring disclosure of a transcript two weeks before trial to allow time to check its accuracy. The prosecutor replied the recording was important to the People's case and there were no objections to the accuracy of the transcript. Defense counsel said she had not objected because she did not have time to review the transcript for accuracy.

The court said the prosecutor could not play the recording for the jury. However, the prosecutor could cross-examine defendant about the contents of the tape-recording of his postarrest statements to Sergeant Boyer. The court also held the prosecutor could show the transcript to defendant to refresh his recollection. The court said it would reconsider the matter if defendant's trial testimony was directly contradicted by the recording.

D. Defendant's Testimony About his Postarrest Statement

After the court's ruling, the prosecutor resumed cross-examination and asked defendant about the statements he made to Sergeant Boyer after he was taken into custody. As set forth above, defendant testified Boyer interrupted him when he was trying to make his statement, he was high, he was confused because of his drug use, he

was speaking erratically because he had been kneed in the head, and he did not tell Boyer what happened because he wanted to speak to an attorney first.

E. The Prosecutor's Motion to Call Sergeant Boyer on Rebuttal

After the defense rested, the prosecutor stated that she was going to call Sergeant Boyer as a rebuttal witness, and again moved to introduce the entirety of defendant's post-arrest statements.

The court said that defendant's testimony was fairly consistent with his postarrest statements, and it was "pretty clear" that defendant decided not to tell Sergeant Boyer what happened. The prosecutor asked if she could "make clear" that Boyer gave defendant the opportunity to explain what happened, and defendant "was not interrupted as was sort of portrayed on the stand." The court agreed that defendant could be impeached on whether he was interrupted when he talked to Boyer, and what he said about his methamphetamine use.

Defense counsel objected to using the post-arrest statement because the prosecutor refused to show defendant the transcript when he testified, and defendant never had the opportunity to explain his statements to Boyer. The court disagreed and noted that defendant testified he did not tell Boyer about his methamphetamine use.

1. The court's ruling

The court concluded that the prosecutor could call Sergeant Boyer in rebuttal as follows:

> "The court will allow [Boyer] to be called *for two purposes*: One, a prior inconsistent statement to [defendant's] testimony on the stand. I'm not discussing what the testimony or what the statement was that was given shortly after his arrest. *On the stand he said he used methamphetamine that day*. [Boyer's] testimony would be a prior inconsistent statement to that testimony.
>
> "Also on the stand [defendant] did state that one of the reasons that he didn't explain what had happened was because not only that he wanted to give his story *but he was being interrupted*.

"So to that degree I'll allow that question. Both of those I believe would be very brief lines of inquiry." (Italics added.)

The court asked the prosecutor whether there was any other rebuttal evidence.

"[THE PROSECUTOR]: I don't believe so, Your Honor.

"THE COURT: I don't want to shut you down. If there's something else that we haven't talked about feel free.

"[THE PROSECUTOR]: No. At this point I think I'm good, Judge."

The prosecutor did not make any additional motions to introduce rebuttal evidence.

F. Sergeant Boyer's Rebuttal Testimony

As set forth above, Sergeant Boyer testified on rebuttal he responded to the scene after defendant was taken into custody. He spoke to defendant in the back of a patrol car, and recorded the interview.

The prosecutor asked Sergeant Boyer, "[W]hat, if anything, did you ask him when you first started speaking with him?" Defense counsel immediately objected as improper impeachment. The court directed the prosecutor to rephrase the question. The prosecutor asked Boyer about his purpose for responding to the scene. Defense counsel again objected. The court allowed the question.

Sergeant Boyer testified he responded to the scene to interview the person that the officers used force on, and obtain a statement if possible, to complete an administrative document for that use of force.

The prosecutor asked Sergeant Boyer if defendant explained what happened. Boyer testified defendant "kind of rambled." Defense counsel objected for improper impeachment. The court directed Boyer to answer whether defendant gave a statement. Boyer testified defendant "attempted to."

The prosecutor asked Sergeant Boyer if defendant said that "he was just laying there and that he was tased?" Defense counsel again objected as improper impeachment.

The court sustained the objection. The court then asked Boyer if defendant gave "specific facts" about what happened "based on his recollection." Boyer said no.

The prosecutor asked Sergeant Boyer if defendant said "that Officer Keener said he would kill him?" Defense counsel objected and asked for a sidebar. The court said a sidebar was not needed and sustained the objection "based on the court's previous ruling."

Sergeant Boyer testified he asked defendant if he had used drugs, and defendant gave a rambling statement and did not say that he had been using drugs.

> "Q And at any time did [defendant] make any complaints to you about excessive force?
>
> "A No, he did not."

Defense counsel objected for improper impeachment. The court sustained the objection and the prosecutor did not ask any more questions.

On cross-examination, defense counsel asked Sergeant Boyer about his conversation with defendant.

> "[DEFENSE COUNSEL]: And just specifically regarding – you said that he didn't tell you what happened. At multiple times throughout your conversation he said that he did not wish to discuss it with you; is that fair?
>
> "[THE PROSECUTOR]: Objection, Your Honor.
>
> "THE COURT: Sustained based upon the court's previous ruling on where this is going. You may ask that question if you understand that may change my ruling."

Defense counsel requested a sidebar, and the court held an unreported conference. Thereafter, defense counsel had no further questions, and did not request any admonitions about Sergeant Boyer's testimony.

G. Closing Argument

In her rebuttal closing argument, the prosecutor discussed defendant's trial testimony that he felt "betrayed" by what the officers did to him.

> "[THE PROSECUTOR]: He was asked how he felt that night and he said he was so betrayed. He felt so betrayed. So betrayed that *he never filed a complaint for excessive force*, that he never—
>
> "[DEFENSE COUNSEL]: Objection. Misstates evidence. Assumes facts not in evidence.
>
> "THE COURT: Sustained.
>
> "[THE PROSECUTOR]: *You didn't hear any testimony that he made any complaints at any point.*
>
> "[DEFENSE COUNSEL]: Same objection.
>
> "THE COURT: Sustained.
>
> "[THE PROSECUTOR]: *You didn't hear any testimony from Officer Boyer that he said anything about what he testified to, that Officer Keener had bounced his chest and leaned in and said I'm going to kill you*…." (Italics added.)

Defense counsel did not ask for any admonitions.

After the jury was excused, the court asked the parties whether they wanted to place anything on the record. Both parties said no.

H. Analysis

Defendant argues the prosecutor committed misconduct because she asked Sergeant Boyer questions designed to elicit testimony about defendant's postarrest statements that went beyond the court's limited evidentiary rulings.

The People assert the prosecutor did not commit misconduct because the court did not impose any evidentiary limitations on Sergeant Boyer's rebuttal testimony. In support of this argument, the People cite the court's statement to the prosecutor, that it did not want to "shut you down. If there's something else that we haven't talked about

feel free." We have quoted the entirety of this exchange above, and the People fail to note that it continued with the prosecutor replying: "No. At this point I think I'm good, Judge."

We reject the People's claim that the court did not impose evidentiary limitations on Sergeant Boyer's testimony. As we have explained, the court repeatedly denied the prosecutor's motions to introduce the entirety of defendant's postarrest statements, and only allowed Boyer's testimony for the limited purpose of impeaching defendant's trial testimony on two specific points. Given the court's evidentiary rulings, its statement to the prosecutor that it did not want to "shut you down" cannot be interpreted as an invitation to introduce rebuttal evidence on her own volition. Instead, the court was simply inviting further argument on whether the prosecutor intended to introduce additional rebuttal evidence, and the prosecutor declined.

As to defendant's misconduct argument, "[i]t is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]" (*People v. Crew*, *supra,* 31 Cal.4th at p. 839.) "A prosecutor 'may not, under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony.' [Citation.]" (*People v. Murillo* (2014) 231 Cal.App.4th 448, 455.) "It is also misconduct for a prosecutor to make remarks in … closing arguments that refer to evidence determined to be inadmissible in a previous ruling of the trial court." (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.)

In contrast to the topic of the toxicology report, the court specifically addressed the admissibility of defendant's postarrest statements to Sergeant Boyer before he testified. The court denied the prosecutor's pretrial motion to introduce these statements in the People's case-in-chief because of the *Miranda* violation. The court also denied the prosecutor's motion to play the recording or introduce the transcript while cross-examining defendant because of the People's discovery violation.

The court held that Sergeant Boyer could testify about defendant's postarrest statements to impeach defendant's trial testimony on only two issues: whether Boyer interrupted defendant when he tried to give a statement about the incident and what defendant said about his methamphetamine use.

Despite this ruling, the prosecutor asked Sergeant Boyer questions that went beyond the scope of the evidentiary order. She broadly asked Boyer if defendant made specific statements about the incident, such as being "tased," whether defendant said that Officer Keener threatened to kill him, and whether defendant complained about excessive force. In rebuttal argument, the prosecutor again referred to these topics and asserted defendant never made an excessive force complaint when he talked to Boyer.

Defendant repeatedly objected to these questions as improper impeachment. He also objected to the prosecutor's rebuttal argument. In light of the court's evidentiary ruling, these objections clearly preserved the claim that the prosecutor's improper impeachment went beyond the scope of the court's rulings and constituted misconduct. The court sustained defendant's objections to these questions, directed the prosecutor to rephrase, and directed Sergeant Boyer only to give limited answers.

Nevertheless, defendant did not request any admonitions in response to the court's rulings. Defendant argues he was excused from requesting admonitions because defense counsel requested a sidebar during Sergeant Boyer's testimony, but the court denied the request and said a sidebar was not necessary and sustained the objection based on its previous ruling about impeachment.

Even assuming defendant was excused from requesting admonitions, he again "fails to demonstrate the inadequacy of the remedy he did receive when his various objections were sustained." (*People v. Tully*, *supra*, 54 Cal.4th at p. 1015.) The court sustained defendant's objections before Sergeant Boyer could answer the prosecutor's questions except in one instance, when Boyer testified that defendant did not make any complaints about excessive force. This was the statement that the prosecutor repeated in

rebuttal argument. Defendant objected to the argument but again did not request admonitions.

We find that Sergeant Boyer's testimony about defendant's failure to make a complaint, and the prosecutor's rebuttal argument on this topic, were not prejudicial because the jury had already heard admissible evidence on the same subject. Defendant testified on direct examination that he did not tell Boyer about the incident, or accuse Officer Keener of using excessive force, because he wanted to talk to an attorney first. Thus, the jury was already aware that defendant did not make an excessive force claim when he talked to Boyer that night, and the reason he did not do so.

We conclude that the prosecutor's misconduct was not prejudicial given the entirety of the record.

DISPOSITION

The court abused its discretion when it denied defendant's pretrial *Pitchess* motion for disclosure of information about the five excessive force complaints filed against Officer Keener. Defendant's convictions in counts I, II, and III are conditionally reversed with directions to the trial court to order disclosure of relevant information in Officer Keener's personnel file, as explained in this opinion and within the limitations of the *Pitchess* procedures, and allow defendant a reasonable opportunity to investigate the disclosed information and file a motion for new trial.

If defendant declines to file a motion for new trial, or defendant files a motion for new trial based on the *Pitchess* information and the court denies it, then the court shall address the instructional errors.

Defendant's convictions in counts I and III for felony obstructing or resisting an executive officer by means of threats or violence, in violation of section 69, are also subject to conditional reversal for a second reason – the court's failure to instruct on lesser included misdemeanor offenses, pursuant to the procedures outlined in *People v. Brown, supra*, 245 Cal.App.4th at p. 173 and *People v. Hayes* (2006) 142 Cal.App.4th

175, 184. As provided in *Hayes* and *Brown*, if the People do not retry defendant on the charged felony offenses in counts I and III, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of misdemeanor simple assault, and shall resentence defendant accordingly on those counts.

The instructional error does not affect defendant's conviction and sentence in count II for the felony offense of unlawfully attempting to remove an officer's firearm from its holster while the officer was engaged in the performance of lawful duty (§ 148, subd. (d)). If count II is not reversed under the *Pitchess* issue, that conviction and the sentence imposed shall be reinstated.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
PEÑA, J.

_____
MCCABE, J.*

* Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.